DOCKET

No. 08-1529
Vide 08-1547
Title: Esther Hui, et al., Petitioners

v.

Yanira Castaneda, as Personal Representative of the Estate of Francisco Castaneda, et al.

Docketed: June 11, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-55684)
Decision Date: October 2, 2008
Rehearing Denied: January 29, 2009
Questions Presented

---Date---	--------Proceedings and Orders----------
Apr 9 2009	Application (08A877) to extend the time to file a petition for a writ of certiorari from April 29, 2009 to May 29, 2009, submitted to Justice Kennedy.
Apr 10 2009	Application (08A877) granted by Justice Kennedy extending the time to file until May 29, 2009.
May 18 2009	Application (08A877) to extend further the time from May 29, 2009 to June 12, 2009, submitted to Justice Kennedy.
May 19 2009	Application (08A877) granted by Justice Kennedy extending the time to file until June 12, 2009.
Jun 11 2009	Petition for a writ of certiorari filed. (Response due July 13, 2009)
Jul 1 2009	Order extending time to file response to petition to and including August 12, 2009.
Jul 10 2009	Brief amicus curiae of United States filed. VIDED.
Aug 12 2009	Brief of respondents Yanira Castaneda and Vanessa Castenada in opposition filed. VIDED.
Aug 25 2009	Reply of petitioners Eugene Migliaccio, et al. filed. (Distributed)
Aug 26 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 30 2009	Petition GRANTED The petition for a writ of certiorari in No. 08-1547 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Oct 29 2009	Stipulation to dismiss the writ of certiorari only as to Eugene Migliaccio and Timothy Shack pursuant to Rule 46 received.
Oct 29 2009	Writ of certiorari only as to Eugene Migliaccio and Timothy Shack dismissed pursuant to Rule 46.
Oct 30 2009	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 4, 2009.
Oct 30 2009	The time to file respondents' briefs on the merits is extended to and including January 15, 2010.
Nov 30 2009	SET FOR ARGUMENT ON Tuesday, March 2, 2010.
Dec 4 2009	Brief of petitioner Commander Stephen Gonsalves filed.
Dec 4 2009	Joint appendix filed. (Statement of costs filed)
Dec 4 2009	Brief of petitioner Esther Hui filed.
Dec 10 2009	Brief amici curiae of Commissioned Officers Association of the United States Public Health Service, Inc. et al. filed.

Dec 11 2009	Brief amicus curiae of United States filed.
Dec 17 2009	CIRCULATED.
Jan 5 2010	Record received from U.S.D.C. for Central District of California. (1 envelope)
Jan 5 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope).
Jan 15 2010	Brief of respondents Yanira Castaneda and Vanessa Castenada filed. (Distributed)
Jan 22 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 22 2010	Brief amici curiae of National Experts on Health Services for Detained Persons filed. (Distributed)
Jan 22 2010	Brief amicus curiae of American Civil Liberties Union filed. (Distributed)
Jan 22 2010	Brief amicus curiae of National Immigrant Justice Center filed. (Distributed)
Jan 22 2010	Brief amici curiae of Rep. John Conyers, Jr., Rep. Zoe Lofgren, and Rep. Jerrold Nadler. filed. (Distributed)
Feb 16 2010	Reply of petitioner Commander Stephen Gonsalves filed. (Distributed)
Feb 16 2010	Reply of petitioner Esther Hui filed. (Distributed)
Feb 19 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 2 2010	Argued. For petitioners: Elaine J. Goldenberg, Washington, D. C.; and Pratik A. Shah, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Conal Doyle, Oakland, Cal.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

081529 JUN 11 2009

OFFICE OF THE CLERK

NO. —

IN THE

Supreme Court of the United States

EUGENE MIGLIACCIO, TIMOTHY SHACK, ESTHER HUI, AND STEPHEN GONSALVES

Petitioners,

v.

YANIRA CASTANEDA AND VANESSA CASTANEDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a) make the Federal Tort Claims Act the exclusive remedy for claims arising from medical care and related functions provided by Public Health Service personnel, thus barring *Bivens* actions?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, Chris Henneford was a defendant in the district court and appellant in the court of appeals.

Respondent Yanira Castaneda is the personal representative of Francisco Castaneda's estate. Respondent Vanessa Castaneda is the beneficiary of the estate, by and through her mother and guardian Lucia Pelayo.

The United States, George Molinar, Claudia Mazur, Daniel Hunting, Susan Pasha, and Michael Sheridan were defendants in the district court but were not parties to the appeal. The United States was an *amicus* in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Eugene Migliaccio, Timothy Shack, Esther Hui, and Stephen Gonsalves ("petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion below (Pet. App. 1a) is reported at 546 F.3d 682. The decision of the district court (Pet. App. 41a) is reported at 538 F. Supp. 2d 1279.

JURISDICTION

The judgment of the Ninth Circuit was entered on October 2, 2008. A timely petition for rehearing *en banc* was denied on January 29, 2009. Pet. App. 81a. On April 10, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to May 29, 2009. On May 19, 2009, he further extended the time until June 12, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The governing statute is 42 U.S.C. § 233(a):

> (a) Exclusiveness of remedy
>
> The remedy against the United States provided by sections 1346(b) and 2672 of title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for

> personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

STATEMENT

1. This damage action arose from medical care Francisco Castaneda received while in the custody of the California Department of Corrections and thereafter as an immigration detainee in the custody of U.S. Immigration and Customs Enforcement ("ICE"). Within the Public Health Service ("PHS"), the Division of Immigration Health Services ("DIHS") provides health care at ICE Service Processing Centers and contract detention facilities.

Mr. Castaneda sued the United States under the Federal Tort Claims Act ("FTCA"), medical personnel under California law, and state and federal officials in their individual capacity under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). He claimed that because PHS personnel[1] acted with de-

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[1] These officials range from a physician who had direct contact with Mr. Castaneda (Esther Hui, M.D.), to mid-level health services administrators at ICE detention facilities (Stephen Gonsalves and Chris Henneford), to an Associate

liberate indifference to his health needs and discriminated against him on the basis of his immigration status, they are personally liable under *Bivens*. Respondents were substituted for Mr. Castaneda after he died of metastatic cancer.

2. The United States admitted liability on respondents' FTCA claims for medical negligence. It certified that the PHS personnel were acting "within the course and scope of their employment with the United States at all times material" to the incidents alleged in the complaint. 28 C.F.R. §§ 15.3(a), 15.4(b). The PHS defendants moved to dismiss on the ground that § 233(a) makes the FTCA the exclusive remedy for claims arising out of medical care and related functions provided by PHS personnel, thereby precluding *Bivens* claims premised on the same conduct.[2]

3. The district court denied the motion to dismiss. In its view, § 233(a) explicitly preserves, rather

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Medical Director at DIHS's Washington-based headquarters (Timothy Shack, M.D.), all the way up to the Director of DIHS (Eugene Migliaccio, Dr.P.H.). Respondents allege that petitioners purposefully and improperly denied Mr. Castaneda access to needed medical care. They also allege that Drs. Shack and Migliaccio, among others, promulgated or ratified a policy of providing detainees with constitutionally inadequate care.

[2] *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), explains that "vicarious liability is inapplicable to *Bivens*" actions and that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." Whether the complaint contains sufficient factual matter to "'state a claim to relief' against each individual petitioner "that is plausible on its face,'" *id.* at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), is not before the Court.

than precludes, *Bivens* claims against PHS personnel. In particular, the district court reasoned that § 233(a) expressly recognizes a cause of action against PHS personnel for constitutional torts because it references the remedy provided by 28 U.S.C. § 1346(b)(1), which, in turn, is "[s]ubject to the provisions of chapter 171 of this title." The court therefore followed what it considered the "statutory trail" to 28 U.S.C. § 2679 (which is in "chapter 171 of this title") to conclude that "[t]he 'exclusive remedy' available to redress damage caused by PHS personnel pursuant to § 233(a) . . . 'does not extend or apply' to suits 'brought for a violation of the Constitution'" under § 2679(b)(2)(A). Pet. App. 58a-62a.

The district court acknowledged that its decision was contrary to, among other cases, *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000). It insisted, however, that the Second Circuit had simply failed to follow "the statutory trail" and "for whatever reason, was not aware of what the FTCA remedy in fact consisted." Pet. App. 64a.

4. The Ninth Circuit affirmed. Pet. App. 1a. In its view, *Carlson v. Green*, 446 U.S. 14 (1980), "compels the conclusion that § 233(a) does not preclude relief under *Bivens*." Pet. App. 18a. *Carlson* held that, absent a contrary expression from Congress, the FTCA is not the exclusive remedy where a constitutional claim is asserted against a prison official. 446 U.S. at 20. It expressly buttressed this conclusion by citing the PHS Act as an example of Congress having "follow[ed] the practice of explicitly stating when it means to make FTCA an exclusive remedy." *Id.* The Ninth Circuit dismissed *Carlson*'s treatment of § 233(a) as dictum, and read the perti-

nent language to mean that although Congress could have declared the FTCA the exclusive remedy when it enacted § 233(a) (thus precluding federal constitutional claims), it had not done so. Pet. App. 35a-36a.

The Ninth Circuit acknowledged that both its holding and its reading of *Carlson* conflict with *Cuoco*. Pet. App. 35a-37a.

REASONS FOR GRANTING THE PETITION

Congress provided in § 233(a) that an FTCA claim "shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim." Despite its sweep, the Ninth Circuit held that § 233(a) does not bar *Bivens* claims against PHS personnel.

The decision below warrants review because it misapplies *Carlson*, and conflicts with decisions of every other federal court (other than three district courts we are aware of—including the one below) to have addressed the Question Presented. The Second, Third, Fourth, Fifth and Sixth Circuits and, until this case, the Ninth, have all held that § 233(a) precludes *Bivens* relief.[3] The decision below also con-

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[3] *Cuoco*, 222 F.3d 99, 109; *Wallace v. Dawson*, No. 07-0864, 302 F. App'x 52, 54 (2d Cir. 2008); *Anderson v. Bureau of Prisons*, 176 F. App'x 242, 243 (3d Cir. 2006) (per curiam), *cert. denied*, 547 U.S. 1212 (2006); *Butler v. Shearin*, 279 F. App'x 274, 275 (4th Cir. 2008) (per curiam), *aff'g*, No. 04-2496, 2006 WL 6083567, at *7 (D. Md. Aug. 29, 2006); *Cook v. Blair*, 82 F. App'x 790, 791 (4th Cir. 2003), *aff'g*, No. 02-609, 2003 WL 23857310, at *1 (E.D.N.C. Mar. 21, 2003); *Montoya-Ortiz v. Brown*, 154 F. App'x 437, 439 (5th Cir. 2005); *Schrader v. Sandoval*, No. 98-51036, 1999 WL 1235234, at *2 (5th Cir. Nov. 23, 1999); *Walls v. Holland*, No. 98-6506, 1999 WL 993765, at

flicts with numerous district court decisions.[4] The case raises an important and obviously recurring is-

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*2 (6th Cir. Oct. 18, 1999); *Beverly v. Gluch*, No. 89-1915, 1990 WL 67888, at *1 (6th Cir. May 23, 1990); *Miles v. Daniels*, 231 F. App'x 591, 591-92 (9th Cir. 2007); *Zanzucchi v. Wynberg*, No. 90-15381, 1991 WL 83937, at *2 (9th Cir. May 21, 1991).

[4] *E.g., Uribe v. Outlaw*, No. 08-019, 2009 WL 322952, at *5 (E.D. Ark. Feb. 9, 2009); *Jones v. Hammond*, No. 07-6, 2009 WL 277537, at *9 (N.D. W. Va. Feb. 5, 2009); *Jackson v. United States*, No. 06-88, 2009 WL 33324, at *5 (W.D. Pa. Jan. 5, 2009); *Morales v. White*, No. 07-2018, 2008 WL 4585340, at *11 (W.D. Tenn. Oct. 10, 2008); *Walker v. Reese*, No. 06-154, 2008 WL 4426123, at *12-14 (S.D. Miss. Sept. 25, 2008); *Stine v. Fetterhoff*, No. 07-02203, 2008 WL 4330572, at *7-8 (D. Colo. Sept. 19, 2008); *Hairston v. Gonzales*, No. 07-3078, 2008 WL 2761315, at *3 (E.D.N.C. July 11, 2008); *Teague v. Hood*, No. 06-01800, 2008 WL 2228905, at *6 (D. Colo. May 27, 2008); *Cope v. Felts*, No. 05-01175, 2008 WL 759078, at *4 (S.D. W. Va. Mar. 19, 2008); *Muhammad v. Sosa*, No. 06-0763, 2008 WL 762253, at *2 (D. Colo. Mar. 19, 2008); *Pike v. Guia*, No. 207-039, 2008 WL 649228, at *2-3 (S.D. Ga. Mar. 10, 2008); *Batey v. Swanson*, No. 07-12, 2008 WL 467384, at *2 (N.D. W. Va. Feb. 19, 2008); *Anson v. Bailey*, No. 06-0394, 2009 WL 414017, at *1 (W.D.N.Y. Feb. 18, 2009); *Lyons v. United States*, No. 03-1620, 2008 WL 141576, at *12 n.5 (N.D. Ohio Jan. 11, 2008), *abrogated by* 2009 WL 997300, at *11 n.6 (N.D. Ohio Apr. 14, 2009); *Lee v. Guavara*, No. 06-1947, 2007 WL 2792183, at *14 (D.S.C. Sept. 24, 2007); *Fourstar v. Vidrine*, No. 06-916, 2007 WL 2781894, at *4 (S.D. Ind. Sept. 21, 2007); *Hodge v. United States*, No. 06-1622, 2007 WL 2571938, at *4-5 (M.D. Pa. Aug. 31, 2007); *Coley v. Sulayman*, No. 06-3762, 2007 WL 2306726, at *4-5 (D.N.J. Aug. 7, 2007); *Jackson v. Fed. Bureau of Prisons*, No. 06-1347, 2007 WL 843839, at *9 (D. Minn. Mar. 16, 2007); *Salley v. Ellis*, No. 06-138, 2006 WL 3734242, at *1 (M.D. Ga. Dec. 15, 2006); *Bacz v. Arbuckle*, No. 06-13, 2006 WL 33449591, at *3-4 (M.D. Ga. Nov. 17, 2006); *Davis v. Stine*, No. 06-156, 2006 WL 3140169, at *6 (E.D. Ky. Oct. 31, 2006); *Barbaro v. United States*, No. 05-6998, 2006 WL 3161647, at *1 (S.D.N.Y. Oct. 30, 2006); *Williams v. Stepp*, No. 03-0824, 2006 WL 2724917, at *3-4 (S.D. Ill. Sept. 21, 2006); *Cuco v. Fed.*

sue that, because of the nature of the PHS, specially calls for a uniform national rule.

A. The decision below conflicts with decisions of this Court

1. The Ninth Circuit misapplied *Carlson*

Despite the Ninth Circuit's claim to have relied on *Carlson*, its decision is plainly at odds with that case and its progeny. *Carlson* identified two situations in which a *Bivens* action may be defeated:

> The first is when defendants demonstrate special factors counseling hesita-

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Med. Ctr.-Lexington, No. 05-232, 2006 WL 1635668, at *20 (E.D. Ky. June 9, 2006); *Arrington v. Inch*, No. 05-0245, 2006 WL 860961, at *5 (M.D. Pa. Mar. 30, 2006); *Foreman v. Fed. Corr. Inst.*, No. 504-01260 2006 WL 4537211, at *8 (S.D. W. Va. Mar. 29, 2006); *Smith v. Anderson*, No. 05-0407, 2006 WL 771929, at *2-3 (S.D. W. Va. Mar. 27, 2006); *Pimentel v. Deboo*, 411 F. Supp. 2d 118, 126-27 (D. Conn. 2006); *Baskette v. United States*, No. 605-00034, 2006 WL 148752, at *1 (W.D. Va. Jan. 19, 2006); *Whooten v. Bussanich*, No. 04-223, 2005 WL 2130016, at *3 (M.D. Pa. Sept. 2, 2005); *Freeman v. Inch*, No. 04-1546, 2005 WL 1154407, at *2 (M.D. Pa. May 16, 2005); *Dawson v. Williams*, No. 04-1834, 2005 WL 475587, at *8 (S.D.N.Y. Feb. 28, 2005); *Lovell v. Cayuga Corr. Facility*, No. 02-6640, 2004 WL 2202624, at *2 (W.D.N.Y. Sept. 2[illegible], 2004); *Tillitz v. Jones*, No. 03-742, 2004 WL 2110709, at *3 (D. Or. Sept. 22, 2004); *Valdivia v. Hannefed*, No. 02-0424, 2004 WL 1811398, at *4 (W.D.N.Y. Aug. 10, 2004); *Brown v. McElroy*, 160 F. Supp. 2d 699, 703 (S.D.N.Y. 2001); *Navarrete v. Vanyur*, 110 F. Supp. 2d 605, 606-07 (N.D. Ohio 2000); *Lewis v. Sauvey*, 708 F. Supp. 167, 169 (E.D. Mich. 1989).

The only contrary district court authorities of which we are aware, aside from the decision in the instant case, are *Vinzant v. United States*, No. 07-024, 2008 WL 4414630, at *4 n.3 (C.D. Cal. Sept. 28, 2008), and *McMullen v. Herschberger*, No. 91-3235, 1993 WL 6219, at *3 (S.D.N.Y. Jan. 7, 1993).

> tion in the absence of affirmative action by Congress. The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

446 U.S. at 18-19 (internal quotation and citation omitted).

The *Carlson* petitioners argued that, by amending 28 U.S.C. § 2680(h) to allow a cause of action against the United States for intentional torts, Congress expressed its intent to preclude *Bivens* actions arising out of the same conduct. *Carlson* rejected that contention. 446 U.S. at 19-20. First, it found no special factors counseling hesitation in the absence of affirmative action by Congress. Second, it examined the FTCA and observed that it does not contain an "explicit congressional declaration . . . to preempt a *Bivens* remedy . . ." *Id.* at 19. The Court therefore concluded that, "[i]n the absence of a contrary expression from Congress," FTCA and *Bivens* actions may be brought simultaneously for the same alleged wrongdoing. *Id.* at 20. *Carlson* buttressed this conclusion by citing the PHS Act as an example of an explicit congressional declaration of FTCA exclusivity. *Id.*

The Ninth Circuit reached the opposite conclusion. It passed over § 233(a)'s plain language by misreading and misapplying *Carlson*'s test for preemption:

> *Carlson* established a two-part test for express *Bivens* preemption: Congress

> must provide an alternative remedy that is "explicitly declared to be a substitute for" *Bivens* (rather than a complement to it) and Congress must view that remedy as "equally effective." 446 U.S. at 18-19. Both of these elements must be present for a court to find the *Bivens* remedy expressly displaced.

Pet. App. 13a.

The Ninth Circuit concluded that the PHS Act does not satisfy this test for preemption because it "does not mention the Constitution or recovery thereunder, let alone 'explicitly declare[]' itself to be a 'substitute for recovery directly under the Constitution,'" *Id.* at 19a (quoting *Carlson*, 446 U.S. at 18-19), and *Carlson* "held that Congress does not view the FTCA as providing relief that is 'equally effective' as *Bivens* relief." *Id.* at 13a.[5]

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[5] The Ninth Circuit mistakenly concluded that § 233(a)'s express language of exclusivity "cannot be read as an expression of Congress's desire" to preempt *Bivens* relief "for the simple reason that *Bivens* relief did not exist when § 233(a) was enacted." Pet. App. 19a. History and the familiar rule as to what Congress is presumed to know foreclose this analysis. The jurisprudential sources for a private cause of action for damages arising under the Constitution had taken root long before either *Bivens* or § 233(a). *E.g.*, 42 U.S.C. § 1983 (codifying Civil Rights Act of 1871 and providing for damage actions against state officials who violate constitutional rights); *Bivens*, 403 U.S. at 395 (damage claim for constitutional violations "should hardly seem a surprising proposition" since, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty") (citations omitted); *id.* at 429 (Black, J., dissenting) (§ 1983 creates "strong inference" that Congress knew how but chose not to permit damages rem-

The Ninth Circuit's reading of *Carlson*'s test for preemption not only led it to the wrong conclusion but is the kind of construction the Court rejected in *Carlson*. *See* 446 U.S. at 19 n.5. The Court there made clear that a party asserting preemption "need not show that Congress recited any specific 'magic words'" in order to "satisfy this test" and enact an exclusive remedy. *Id.* This clarification responded to Chief Justice Burger's dissent, which pointed out that, taken literally, *Carlson* "seems to require" the use of "magic words" to provide an exclusive remedy. *Id.* at 31 & n.2 (Burger, C.J., dissenting); *see also id.* at 26-27 (Powell, J., concurring) (describing as dicta the very language the Ninth Circuit converted into "elements" of *Carlson*'s preemption test and cautioning against reading that very language as "prescribed linguistic garb"); *id.* at 31-33 & n.2 (Rehnquist, J., dissenting) (criticizing majority's "formalistic procedural approach for inferring private damages remedies" and agreeing with Justice Powell that language in majority's opinion is "properly viewed as dicta").

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edy against individual federal agents for constitutional violations); *Bell v. Hood*, 327 U.S. 678 (1946) (holding that damage action against federal agents for constitutional violations stated claim arising under Constitution for purpose of federal question jurisdiction, although reserving judgment on whether, as pled, plaintiff there had stated cause of action); *Bivens*, 403 U.S. at 389 (noting that *Bell* had reserved decision on the question).

Congress must therefore be presumed to have been aware of not only the *Bivens* litigation, including the lower court decisions and the grant of certioriari, but also the concept of a constitutional tort prior to enacting § 233(a). Pet. App. 22a n.10 (acknowledging that this Court had already granted certiorari in *Bivens* when Congress enacted § 233(a)).

Because it misunderstood what constitutes an "explicit declaration" under *Carlson*, the Ninth Circuit failed to give effect to § 233(a)'s command that the "remedy against the United States" provided by the FTCA "shall be exclusive of any other civil action or proceeding" without exception. Section 233(a) easily satisfies *Carlson*'s test for preemption because it is all-encompassing. There is therefore no need for it to "mention the Constitution or recovery thereunder," as the Ninth Circuit suggested, Pet. App. 19a, or to define what "other actions" are preempted. An "exclusive remedy" by definition precludes all other remedies absent an express congressional exception. That is how *Carlson* uses the term. 446 U.S. at 19 ("[W]ithout a clear congressional mandate, we cannot hold that Congress relegated respondent exclusively to the FTCA remedy."); *id.* at 27 (Powell, J., concurring) ("Congress possesses the power to enact adequate alternative remedies that would be exclusive"); *id.* at 30-31 (Burger, C.J., dissenting) (discussing whether Civil Rights Act of 1964 provides "exclusive remedy" or permits parallel *Bivens* claims).[6]

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[6] Having determined that § 233(a) has a plain meaning, there was no occasion for the Ninth Circuit to rely on legislative history. Pet. App. 20a-32a. Legislative history is not determinative where, as here, the language of the statute is clear and does not lead to an absurd result. *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.") (citations and internal quotation marks omitted). The parties agreed below that § 233(a) is clear on its face, but differ as to its meaning.

2. *Carlson* does not hold that the FTCA can never be a substitute for *Bivens* relief

The Ninth Circuit claimed that § 233(a) fails an "equally effective" prong that it discerned in *Carlson*'s preemption test. It did so on the notion that *Carlson* "held that Congress does not view the FTCA as providing relief that is 'equally effective' as *Bivens* relief." Pet. App. 13a. But that claim rests on another misreading of *Carlson*. In fact, there is no "equally effective" prong.

Carlson does not hold that the FTCA is a categorically inadequate alternative to *Bivens*. Rather, it holds that, "[i]n the absence of a contrary expression from Congress," FTCA and *Bivens* actions may be brought simultaneously for the same alleged wrongdoing. *Carlson*, 446 U.S. at 20. In other words, the inquiry is whether Congress explicitly declared a remedy to be exclusive. If it has, as in § 233(a), that declaration is the congressional expression that the remedy is sufficient. While *Carlson* cites factors suggesting that "the *Bivens* remedy is more effective than the FTCA remedy," it does so only as "support" for its "conclusion that Congress did not intend to limit respondent to an FTCA action." *Id.* at 20-21.

As the Court explained in *Carlson*, no "magic words" are required for Congress to declare a statutory remedy "equally effective" in order for that remedy to be exclusive and preemptive. *Id.* at 19 n.5. When Congress provides such a remedy, it may express its intent "by statutory language," as it did here ("shall be exclusive of any other remedy," § 233(a)), or in legislative history, or simply by fashioning a comprehensive scheme, whether or not it

explicitly labels the remedy "exclusive." *Bush v. Lucas*, 462 U.S. 367, 378 (1983).

Since *Carlson*, the Court has confirmed that where, as here, Congress provides an adequate alternative remedy that it has declared to be exclusive, that is the end of the inquiry and there is no occasion to examine the efficacy of the remedy. *Bush v. Lucas*, 462 U.S. at 373 (establishing as a threshold matter that "Congress has not expressly precluded the creation of such a [*Bivens*] remedy by declaring that existing statutes provide the exclusive mode of redress"); *see also Bivens*, 403 U.S. at 397 (finding implied damage action only in absence of "explicit congressional declaration" that plaintiff is relegated to other remedy). Indeed, "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, 129 S. Ct. at 1948 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001)). *Bivens* remedies should be recognized only where a plaintiff "lack[s] *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Malesko*, 534 U.S. at 70 (emphasis in original).

Even absent a congressional declaration that an existing statute provides the exclusive mode of redress, the Court has found that the mere existence of an alternative process for protecting a constitutionally recognized interest may be "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, ___, 127 S. Ct. 2588, 2598 (2007); *see also Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government pro-

gram suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."); *Bush v. Lucas*, 462 U.S. at 388 (refusing to create *Bivens* action for federal employees challenging personnel actions even though "existing remedies [did] not provide complete relief").[7]

B. The lower courts are divided over whether § 233(a) precludes *Bivens* actions

Until this case, no Circuit had ever held that § 233(a) preserves rather than precludes *Bivens* relief.

In *Cuoco*, the Second Circuit squarely addressed the question and held that § 233(a) barred a *Bivens* action against individual PHS physicians and other employees working at a federal prison. 222 F.3d at 108-09. Ms. Cuoco, like Mr. Castaneda, had sued PHS medical personnel for violations of her Eighth Amendment rights. The Second Circuit rejected the argument "that § 233(a) provides immunity only from medical malpractice claims," finding that "there is nothing in the language of § 233(a) to support that conclusion." *Id.* at 108. It correctly observed that § 233(a) "protects commissioned officers or employees

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[7] Because the decision below should be reversed on other grounds, the Court has no occasion to determine whether there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Carlson*, 446 U.S. at 18-19. If the Court were to reach that level of the *Carlson* analysis, reversal would still be required given the nature and function of the PHS. *Cf. United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (unique nature of military service is special factor counseling against *Bivens* action despite U.S. Army physicians' secret experimentation with LSD on unsuspecting soldiers).

of the Public Health Service from being subject to suit while performing medical and similar functions by requiring that such lawsuits be brought against the United States instead." *Id.* It therefore held that PHS employees are absolutely immune from suits arising out of medical treatment and decisions related to medical treatment, including suits claiming violations of the Constitution. *Id.* at 107-09.

Cuoco applied *Carlson* to support its conclusion that § 233(a) is an example of "'Congress ha[ving] provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.'" *Id.* at 108 (quoting *Carlson*, 446 U.S. at 18-19). Purporting to apply the same precedent, the Ninth Circuit reached precisely the opposite conclusion. The two decisions cannot both be right. No purpose is served by further percolation in the lower courts.

C. The Question Presented warrants review

The issue is important and, as the decisions cited above demonstrate, recurring. The Court has long recognized that questions of immunity go to the heart of government activity. Left unresolved, they threaten both the effectiveness of federal personnel and their willingness to serve.

PHS personnel provide medical care to underserved areas, immigration detainees, federal prisoners, Native Americans, Alaska Natives, and the Coast Guard. They serve throughout the United States (and even in foreign countries such as Iraq and Afghanistan). PHS's Commissioned Corps is a uniformed service organized along military lines and staffed by officers with military rank equivalents. 42

U.S.C. §§ 201(p), 207. Its members must go where they are ordered.

The already strong interest in a single national rule for federal agencies is at its apogee when dealing with a uniformed service. PHS personnel are detailed to federal agencies such as ICE, the Bureau of Prisons, and the U.S. Marshals Service, whose activities may give rise to patient tort claims. For such an agency, a disparity across circuit lines on an issue as central to sound public administration as immunity for official acts is especially intolerable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2009

APPENDIX

APPENDIX A

No. 08–55684

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Yanira CASTANEDA, as personal representative of Estate of Francisco Castaneda; Vanessa Castaneda, as heir and beneficiary of the Estate, by and through her mother and Guardian Ad Litem Lucia Pelayo, Plaintiffs–Appellees,

v.

UNITED STATES of America; George Molinar, in his individual capacity; Claudia Mazur, in her individual capacity; Daniel Hunting, M.D.; S. Pasha, in his/her individual capacity; M. Sheridan, in his/her individual capacity, Defendants,

and

Chris Henneford, in his individual capacity; Gene Migliaccio, in his individual capacity; Timothy Shack, M.D. in his individual capacity; Esther Hui, M.D., in her individual capacity; Stephen Gonsalves, in his individual capacity, Defendants–Appellants.

Argued and submitted Aug. 15, 2008
Filed Oct. 2, 2008

Appeal from the United States District Court for the Central District of California; Dean D. Pregerson, District Judge, Presiding. D.C. No. 2:07–cv–07241–DDP–JC.

Before: STEPHEN REINHARDT, MARSHA S. BERZON, and MILAN D. SMITH, JR., Circuit Judges.

MILAN D. SMITH, JR., Circuit Judge:

This appeal requires us to decide whether 42 U.S.C. § 233(a) establishes the Federal Tort Claims Act (FTCA) as the exclusive remedy for constitutional violations committed by officers and employees of the Public Health Service (PHS), precluding the cause of action recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). We hold that it does not.

Factual and Procedural Background[1]

A. Factual Background

Decedent Francisco Castaneda was imprisoned by the State of California following a December 6, 2005 criminal conviction and held in the custody of

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[1] All facts, unless otherwise indicated, are drawn from Plaintiffs' Third Amended Complaint. On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), we assume the truth of all allegations in the complaint. *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1039 n. 1 (9th Cir.2003).

the California Department of Corrections (DOC) until his early release date, March 26, 2006. Several times during his approximately three-and-a-half-month incarceration, Castaneda met with DOC medical personnel regarding a white-and-yellow raised lesion, then measuring approximately two centimeters square, on the foreskin of his penis. Twice, in late December and late February, DOC medical providers recommended that Castaneda be referred to a urologist, and that he undergo a biopsy to rule out the possibility of squamous cell cancer. This referral never occurred during Castaneda's detention by DOC, and on March 27, Castaneda was transferred to the custody of Immigration and Customs Enforcement (ICE) at the San Diego Correctional Facility (SDCF).

Immediately upon his transfer, Castaneda brought his condition to the attention of the SDCF medical personnel, members of the Division of Immigration Health Services (DIHS).[2] By this time, the lesion on his penis had become painful, growing in size, bleeding, and exuding discharge. Castaneda met with PHS physician's assistant Lieutenant Anthony Walker,[3] who recommended a urology consult

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[2] DIHS, a division of the Department of Health and Human Services, "is responsible for provision of direct primary health care at all ICE Service Processing Centers and selected contract detention facilities through-out the Nation." Statement of Organization, Functions and Delegations of Authority, 69 Fed.Reg. 56,433, 56,436 (Sept. 21, 2004).

[3] The Public Health Service is one of the seven uniformed services of the United States. 42 U.S.C. § 201(p). Organized along military lines, the PHS is staffed by commissioned officers who maintain a statutorily defined military rank equivalent. 42 U.S.C. § 207. Although the statute defines PHS rank

and a biopsy "ASAP," noting both Castaneda's history of genital warts and his family history of cancer (his mother died at age 39 of pancreatic cancer). That consultation with an outside urologist, John R. Wilkinson, M.D., did not occur until June 7, 2006. Dr. Wilkinson "agree[d] that" Castaneda's symptoms "require[d] urgent urologic assessment of biopsy and definitive treatment," citing the potential for "considerable morbidity from even benign lesions which are not promptly and appropriately treated." Although Dr. Wilkinson's notes indicate that he "offered to admit [Castaneda] for a urologic consultation and biopsy," DIHS physicians indicated their "wish to pursue outpatient biopsy which would be more cost effective." That biopsy, however, did not occur. Instead, Plaintiffs allege that DIHS officials deemed the biopsy, a standard diagnostic procedure to detect a life-threatening disease,[4] to be an "elective outpatient procedure" and declined to approve it.

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by equivalent U.S. Army rank (from Second Lieutenant to Major General for the Surgeon General), *id.*, PHS commissioned officers are referred to by their equivalent U.S. Navy rank (from Ensign to Vice Admiral for the Surgeon General), and wear the corresponding Navy uniform and insignia. *See* U.S. Public Health Service Commissioned Corps, U.S. Dep't of Health & Human Serv., *About the Commissioned Corps: Uniforms* (June 24, 2008), http://www.usphs.gov/AboutUs/uniforms.aspx (last accessed August 18, 2008). Although ordinarily a part of the Department of Health and Human Services, the PHS, like the Coast Guard, may be called into military service in times of war or national emergency, whereupon its personnel become subject to the Uniform Code of Military Justice. 42 U.S.C. § 217.

[4] In 2008, an estimated 1250 men in the United States will develop penile cancer and 290 men will die of it. Am. Cancer Soc'y, *Cancer Facts & Figures: 2008, available at* http://

Castaneda's symptoms grew worse and worse. On June 12, he filed a grievance report, asking for the surgery recommended by Dr. Wilkinson and stating that he was "in a considerable amount of pain and . . . in desperate need of medical attention." On June 23, he reported to Lt. Walker that his lesion was emitting a foul odor, continued to leak pus, and had increased in size, pressing further on his penis and increasing his discomfort. He complained of increased swelling, bleeding from the foreskin, and difficulty in urination. On July 13, instead of scheduling a biopsy, ICE brought Castaneda to the emergency room at Scripps Mercy Chula Vista. The emergency room physician noted the fungating lesion[5] on Castaneda's penis and referred Castaneda to urologist Daniel Hunting, M.D., who, following a brief examination, determined that the lesion was "probably condyloma," or genital warts. Dr. Hunting referred

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www.cancer.org/downloads/STT/2008CAFFfinalsecured.pdf. Most penile cancers are, like Castaneda's, "squamous cell carcinomas (cancer that begins in flat cells lining the penis)," Nat'l Cancer Inst., U.S. Nat'l Inst. of Health, *Penile Cancer*, http://www.cancer.gov/cancertopics/types/penile (last accessed August 18, 2008), which are typically diagnosed via one of several types of skin biopsy. Am. Cancer Soc'y, *Skin Cancer-Basal and Squamous Cell: How Is Squamous and Basal Cell Skin Cancer Diagnosed?* (June 10, 2008), http://www.cancer.org/docroot/CRI/content/CRI_2_4_3X_How_is_skin_cancer_diagnosed_51.asp (last accessed August 18, 2008).

[5] *See* Nat'l Cancer Inst., U.S. Nat'l Inst. of Health, *Dictionary of Cancer Terms*, http://www.cancer.gov/templates/db_alpha.aspx?CdrID=367427 (last accessed August 18, 2008) (defining "fungating lesion" as a "type of skin lesion that is marked by ulcerations (breaks on the skin or surface of an organ) and necrosis (death of living tissue) and that usually has a bad smell").

Castaneda back to his "primary treating urologist" at DIHS. Four days later, Lt. Walker noted that the lesion continued to grow. On July 26, another physician's assistant explained to Castaneda that "while a surgical procedure might be recommended long-term, that does not imply that the federal government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight."

On August 22, Castaneda saw another urologist, Robert Masters, M.D. Dr. Masters concluded that Castaneda had genital warts and was in need of circumcision, which would both relieve the "ongoing medical side effects of the lesion including infection and bleeding" and provide a biopsy for further analysis. This treatment was again denied as "elective in nature." The following month, Lt. Walker noticed "another condyloma type lesion [ ] forming and foul odor emitting from uncircumcised area with mushroomed wart." On November 14, DIHS noted that Castaneda's "symptoms have worsened. States he feels a constant pinching pain, especially at night. States he constantly has blood and discharge on his shorts. . . . Also complains of a swollen rectum which he states makes bowel movements hard." Castaneda was prescribed laxatives. The following day, Castaneda complained that the lesion was growing, that he could not stand and urinate because the urine "sprays everywhere," and that the lesion continued to leak blood and pus, continually staining his sheets and underwear. DIHS responded by increasing Castaneda's weekly allotment of boxer shorts.

On November 17, Castaneda was transferred from San Diego to ICE's San Pedro Service Processing Center. The "Medical Summary of Federal Pris-

oner/Alien in Transit" filed in connection with this transfer listed no "current medical problems." Nevertheless, an examination at the Los Angeles/ Santa Ana Staging area noted the presence of "other penile anomalies."

In early December, Castaneda's counsel from the ACLU became involved in his case, sending multiple letters notifying ICE and Health Service Administration officials of Castaneda's medical problems and urging that he receive the biopsy he had been prescribed almost a year earlier. Apparently in response, Castaneda was sent to yet another urologist, Lawrence S. Greenberg, M.D, on December 14. Dr. Greenberg described Castaneda's penis as a "mess," and stated that he required surgery. The ACLU continued to demand treatment, to no apparent avail. Forty-one days later, January 25, 2007, Castaneda was seen by Asghar Askari, M.D., who diagnosed a fungating penile lesion that was "most likely penile cancer" and, once again, ordered a biopsy.

On February 5, rather than provide the biopsy prescribed by Doctors Wilkinson, Masters, Greenberg, and Askari, ICE instead released Castaneda, who then proceeded on his own to the emergency room of Harbor-UCLA Hospital in Los Angeles. He was scheduled for a biopsy on February 12, which confirmed that Castaneda was suffering from squamous cell carcinoma of the penis. On February 14, Castaneda's penis was amputated, leaving only a two-centimeter stump.

The amputation did not occur in time to save Castaneda's life. In addition to creating a 4.5 centimeter-deep tumor in his penis, the cancer had me-

tastasized to his lymph nodes and throughout his body. Castaneda received chemotherapy throughout 2007, but the treatment was ultimately unsuccessful. Francisco Castaneda died February 16, 2008. He was thirty-six years old.

B. Procedural Background

This action began November 2, 2007, as a suit brought by Castaneda against the United States and a number of state and federal officials and medical personnel. Castaneda alleged inadequate medical care while in DOC and ICE custody that amounted to malpractice, and a violation of his constitutional rights. He asserted various malpractice and negligence claims against the United States under the FTCA and against the individual defendants under California law, and asserted constitutional claims (violations of the Fifth, Eighth, and Fourteenth Amendments) against the individual defendants under *Bivens* and 42 U.S.C. § 1983. He sought compensatory and punitive damages and declaratory relief. Following Castaneda's death, Plaintiffs-Appellants Yanira Castaneda, Castaneda's sister and his estate's personal representative, and Vanessa Castaneda, Castaneda's daughter and sole heir, filed an amended complaint, substituting themselves as plaintiffs and adding various claims under California's Wrongful Death Statute, Cal.Code Civ. Proc. § 377.60 *et seq.*, and Survival Statute, Cal.Code Civ. Proc. § 377.20 *et seq.*

On January 14, 2008, Defendants-Appellants Commander Chris Henneford, Captain Eugene A. Migliaccio, and Commander Stephen Gonsalves, all commissioned officers of the PHS, and Defendants-

Appellants Timothy Shack, M.D., and Esther Hui, M.D., both civilian employees of PHS (collectively, PHS Defendants), moved to dismiss the case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The PHS Defendants argued that they had absolute immunity from *Bivens* actions because 42 U.S.C. § 233(a) provides that an FTCA suit against the United States is the exclusive remedy for tortious acts committed by PHS officers and employees in the course of their medical duties.

On March 11, the district court denied the motion to dismiss, holding that the plain language of § 233(a) "express[ly] preserv[es]" plaintiffs' constitutional claims. *Castaneda v. United States*, 538 F.Supp.2d 1279, 1290 (C.D.Cal.2008). Rejecting the reasoning of the Second Circuit's decision in *Cuoco v. Moritsugu*, 222 F.3d 99, 107-09 (2d Cir.2000), the district court held that § 233(a), through its reference to 28 U.S.C. § 1346(b), incorporated by reference the entirety of the FTCA, including the general exclusivity provision of 28 U.S.C. § 2679(b), which expressly exempts constitutional claims from the FTCA exclusivity, 28 U.S.C. § 2679(b)(2)(A). *Castaneda*, 538 F.Supp.2d at 1288-91. It also held that the legislative history of both § 233(a) and § 2679(b) supported the conclusion that § 233(a) was not intended to preempt *Bivens* actions. *Id.* at 1291-95. The PHS Defendants timely appealed.

Jurisdiction and Standard of Review

District court orders denying absolute immunity constitute "final decisions" for the purposes of 28 U.S.C. § 1291, granting us jurisdiction over this interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511,

524-27, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Trevino v. Gates*, 23 F.3d 1480, 1481 (9th Cir.1994). We re-view such decisions *de novo*. *Trevino*, 23 F.3d at 1482.

Discussion

In *Bivens*, the Supreme Court established that victims of constitutional violations by federal agents have a cause of action under the Constitution to recover damages. As the Supreme Court later clarified, however, this remedy has limits:

> Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.

Carlson v. Green, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (internal citations omitted) (quoting *Bivens*, 403 U.S. at 396, 91 S.Ct. 1999). Under *Carlson*, then, a *Bivens* remedy will not lie (1) when an alternative remedy is both (a) "explicitly declared to be a substitute" and (b) is "viewed as equally effective," or (2) in the presence of "special factors" which militate against a direct recovery remedy.

Carlson provides the starting point for our analysis in this case. The facts and posture of *Carlson* closely resembled those here: in *Carlson*, the plaintiff, the mother of a deceased federal prisoner,

brought suit against federal prison officials on behalf of her son's estate, alleging Eighth Amendment violations. Specifically, she alleged that the federal officials' deliberate indifference to his serious medical needs, amounting to an Eighth Amendment violation, caused the decedent, a chronic asthmatic, to die of respiratory failure. *Id.* at 16 & n. 1, 100 S.Ct. 1468. The defendants argued that the FTCA provided a substitute remedy preempting one under *Bivens*. After noting the two ways in which a *Bivens* remedy can be preempted, the Court held that "[n]either situation obtains in this case." *Id.* at 19, 100 S.Ct. 1468. First, the Court held that "the case involve[d] no special factors counseling hesitation." *Id.* Second, there was no congressional declaration foreclosing the *Bivens* claim and making the FTCA exclusive. No statute declared the FTCA to be a substitute for *Bivens*, and subsequent legislative history "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 20, 100 S.Ct. 1468. The Court further noted four ways in which the remedy in the FTCA could not be seen as an "equally effective" substitute for a *Bivens* remedy. *Id.* at 20-23, 100 S.Ct. 1468; *see also infra* pp. 15-17, 100 S.Ct. 1468.

In this case, too, we have an individual who has died, allegedly due to the deliberate indifference of the federal officials charged with his health and safety. Once again, the decedent's survivors bring a *Bivens* action, alleging Fifth and Eighth Amendment violations.[6] And, once again, the officials argue that

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[6] Unlike the prisoner in *Carlson*, Castaneda was an immigration detainee, not a criminal convict. The argument below framed the issue in terms of a violation of the Eighth Amend-

the FTCA preempts any *Bivens* remedy. The difference is that this time, they do so on the basis of 42 U.S.C. § 233(a), which provides a remedy under the FTCA, rather than on the basis of the FTCA itself.

42 U.S.C. § 233(a) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 . . . for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions . . . by any commissioned officer or employee of the Public Health Service while acting

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ment, *Castaneda*, 538 F.Supp.2d at 1286, and the district court therefore ruled accordingly, *id.* at 1295-98. Castaneda's criminal sentence was complete by the time of his transfer to ICE, and his civil detention in SDCF and San Jose was not "punishment." Plaintiffs' claims against the PHS Defendants, strictly speaking, are therefore rooted in the Fifth Amendment's Due Process clause, not the Eighth Amendment's prohibition on cruel and unusual punishment. *See Bell v. Wolfish*, 441 U.S. 520, 536-37 & n. 16, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In this case, however, that formal distinction is irrelevant: "[w]ith regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes." *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir.2002).

Plaintiffs additionally claim a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, alleging that Castaneda was invidiously denied medical care due to his immigration status and without a rational basis. *Carlson*, too, involved an equal protection claim: "that petitioners['] . . . indifference was in part attributable to racial prejudice." 446 U.S. at 16 n. 1, 100 S.Ct. 1468; *see also Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (*Bivens* relief is available to enforce the equal protection component of the Fifth Amendment's Due Process Clause).

> within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee . . . whose act or omission gave rise to the claim.

There is no dispute that the PHS Defendants were, during all relevant times, commissioned officers or employees of the Public Health Service, and were acting within the scope of their offices or employment. The PHS Defendants claim that the exclusivity provision in § 233(a) acts either to expressly substitute the FTCA for a *Bivens* remedy, or as a "special factor" that would preclude the *Bivens* remedy. We examine each of these arguments in turn.

A. Does § 233(a) Expressly Establish the FTCA as a Substitute Remedy for *Bivens*?

As noted above, *Carlson* established a two-part test for express *Bivens* preemption: Congress must provide an alternative remedy that is "explicitly declared to be a *substitute* for" *Bivens* (rather than a complement to it) *and* Congress must view that remedy as "equally effective." 446 U.S. at 18-19, 100 S.Ct. 1468. Both these elements must be present for a court to find the *Bivens* remedy expressly displaced. We first address the "equally effective" question discussed in *Carlson*.

1. "Viewed as Equally Effective"

The alternative remedy in *Carlson*, like the remedy here, was the FTCA. In *Carlson*, the Supreme Court held that Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief. There is no basis here on which to distinguish

that holding from the case before us; if anything, the FTCA is a *less effective* remedy now than it was when *Carlson* was decided.

Carlson enumerated four factors, "each suggesting that the *Bivens* remedy is more effective than the FTCA remedy." 446 U.S. at 20, 100 S.Ct. 1468. First, *Bivens* damages are awarded against individual defendants, while the FTCA damages are recovered from the United States. "Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, particularly so when the individual official faces personal financial liability." *Id.* at 21, 100 S.Ct. 1468 (citations omitted). Second, punitive damages are not available under the FTCA, further undermining its deterrent effect. "Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. . . . But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts." *Id.* at 22, 100 S.Ct. 1468 (quoting *Bivens*, 403 U.S. at 397, 91 S.Ct. 1999) (citations omitted). Third, *Bivens* cases may be tried before a jury; FTCA cases cannot. *Id.* at 22-23, 100 S.Ct. 1468. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This is particularly important in

the context of constitutional torts, where the actions of the government itself are on trial. Moreover, juries are well-suited to the task of apportioning damages. As Congress noted in explaining the need for jury trials under Title VII, "[j]uries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct." H.R.Rep. No. 102-40(I), at 72 (1991), 1991 U.S.C.C.A.N. 549, 610. Lastly, the FTCA's limitation that the United States may be held liable "in accordance with the law of the place where the act or omission occurred,"28 U.S.C. § 1346(b)(1), would violate the policy "obvious[ly]" motivating *Bivens* "that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Carlson*, 446 U.S. at 23, 100 S.Ct. 1468. This last factor was especially important to the Supreme Court. In *Carlson*, the plaintiff's action would have failed under the survivorship law of the forum state, Indiana. *Id.* at 17 n. 4, 100 S.Ct. 1468.[7] The Court emphasized that "only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged

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[7] In particular, Indiana law provided that a personal injury claim did not survive where the acts complained of caused the victim's death. Ind.Code § 34-1-1-1 (1976). Moreover, where the decedent was not survived by a spouse or dependent next of kin, Indiana's wrongful death statute limited recovery to those expenses incurred in connection with the death itself. Ind.Code § 34-1-1-2 (1976). Indeed, the district court held that, because of the limitations in those two statutes, the plaintiff (the decedent's mother) could not even meet the amount-in-controversy then required by 28 U.S.C. § 1331(a), and dismissed the case for lack of subject matter jurisdiction. *Carlson*, 446 U.S. at 17-18 & n. 4, 100 S.Ct. 1468.

and to protect against repetition of such conduct." *Id.* at 23, 100 S.Ct. 1468.

None of the factors listed by the Supreme Court is any less present in the case before us. The FTCA would be no more a deterrent here than it was in *Carlson*, because FTCA damages remain recoverable only against the United States and because punitive damages remain unavailable. 28 U.S.C. § 2674. Likewise, an FTCA plaintiff still cannot demand a jury trial. 28 U.S.C. § 2402. Moreover, the FTCA remedy continues to depend on the "law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

Nowhere does this reliance on state law present a greater threat to uniformity of remedy than in actions "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions." 42 U.S.C. § 233(a). Since *Carlson* was decided in 1980, the United States has witnessed a revolution in state tort law, focusing on medical malpractice in particular. Reacting to a "crisis" in medical malpractice insurance costs and availability, many states began in the mid-1980s to enact legislative changes designed both to deter frivolous lawsuits and to limit the size of damage awards even in meritorious ones. *See generally* Cong. Budget Office, U.S. Cong., *The Effects of Tort Reform: Evidence from the States* 2-3 (2004), *available at* http://www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf. Twenty-four states, for example, have abolished the collateral-source rule, often permitting collateral-source payments to offset damage awards. Am. Tort Reform Ass'n, *Tort Reform Record* 14-18 (July 1, 2008), *available at*

http://www.atra.org/files.cgi/8291_Record_07-08.pdf. Similarly, twenty-three states have placed statutory limits on non-economic damages, many limiting medical malpractice awards in particular. *Id.* at 32-39, 100 S.Ct. 1468. Statutory damage caps for malpractice can range from $250,000, *see, e.g.*, Cal. Civ.Code § 3333.2(b), to $1.25 million, Ind.Code § 34-18-14-3(a); *see also* Haw.Rev.Stat. § 663-8.7 ($375,000); Fla. Stat. § 766.118(2) ($500,000); Kan. Stat. Ann. § 60-3407(a) ($1 million). Other states have introduced procedural innovations to screen out meritless suits and encourage early settlement, such as requiring that plaintiffs, prior to suit, obtain expert certificates of merits, *e.g.*, Va.Code § 8.01-20.1; W. Va.Code § 55-7B-6, or submit their claims to medical screening panels, *e.g.*, Alaska Stat. § 09.55.536; Haw.Rev.Stat. § 671-12, or participate in other compulsory alternative dispute resolution bodies, *e.g.*, Md.Code, Cts. & Jud. Proc. § 3-2A-04; Wash. Rev.Code § 7.70.100.[8] Were Plaintiffs' sole remedy for the alleged mistreatment and death of Castaneda a common law malpractice suit against the United States, as the PHS Defendants argue, the damages they could recover, and the quasi-substantive procedural hurdles they would have to surmount to bring suit in the first place, would vary from state to state even more now than in 1980.

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[8] We express no opinion here as to whether or how these or similar procedural requirements would apply in an FTCA suit against the United States, although we note that several district courts have found certain of these statutes to apply to FTCA actions. *See, e.g., Stanley v. United States*, 321 F.Supp.2d 805, 807-08 (N.D.W.Va.2004); *Hill v. United States*, 751 F.Supp. 909, 910 (D.Colo.1990); *Oslund v. United States*, 701 F.Supp. 710, 712-14 (D.Minn.1988).

The Supreme Court has never revisited its conclusion that the FTCA's dependence on "the vagaries of the laws of the several States" prevents it from serving as an equally effective remedy for constitutional violations. *Carlson*, 446 U.S. at 23, 100 S.Ct. 1468. While the Supreme Court has, in subsequent years, found that the congressional institution of other remedial schemes that are not fully compensatory may be a "special factor" precluding *Bivens* relief, *see Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) (Social Security); *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) (federal civil service); *see also Adams v. Johnson*, 355 F.3d 1179 (9th Cir.2004) (federal income tax), those cases cannot serve as a basis for distinguishing the Supreme Court's explicit determination in *Carlson* that the very remedy at issue here, the FTCA, is not viewed by Congress as equally effective as *Bivens*. Moreover, every one of those subsequently examined schemes, however otherwise undercompensatory, nonetheless provided a *uniform* remedy across the United States. *Carlson*'s holding that the FTCA, in particular, is not "equally effective" because of its lack of deterrent effect, its absence of a right to a jury trial, and its dependence on variable state law remains binding on this court, and, accordingly, following *Carlson*, we hold that § 233(a) does not preempt *Bivens* relief.

2. "Explicitly Declared To Be a Substitute"

A careful analysis of the first prong of the *Carlson* "explicit [ ] . . . substitute . . . and . . . equally effective [remedy]" standard, *Carlson*, 446 U.S. at 18-19, 100 S.Ct. 1468, also compels the conclusion that § 233(a) does not preclude relief under *Bivens*. The

PHS Defendants maintain that, in § 233(a), Congress "explicitly declared [the FTCA] to be a substitute for recovery directly under the Constitution." *Id.* Specifically, the PHS Defendants urge that we read § 233(a)'s command that the FTCA remedy "shall be exclusive of any other civil action or proceeding" to necessarily include actions or proceedings seeking a *Bivens* remedy. We decline to do so.

a. Text

The plain text alone of § 233 makes it clear that Congress did not explicitly declare § 233(a) to be a substitute for a *Bivens* action. The section does not mention the Constitution or recovery thereunder, let alone "explicitly declare[ ]" itself to be a "substitute for recovery directly under the Constitution." *Carlson*, 446 U.S. at 18-19, 100 S.Ct. 1468.

Moreover, § 233(a) cannot be read as an expression of Congress's desire to substitute the FTCA in place of *Bivens* relief for the simple reason that *Bivens* relief did not exist when § 233(a) was enacted. *See* Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, 84 Stat. 1868 (1970); *Bivens*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Carlson* requires an intention to *substitute* one form of relief for another, but substitution does not occur, and is in fact impossible, if the person or thing being "replaced" does not exist. Because *Bivens* relief did not exist at the time of § 233(a)'s enactment, as well as because there is no mention of constitutional torts in its text, we cannot read the text of § 233(a) as a declaration of Congress's intent to substitute the FTCA for *Bivens* relief.

b. History

Our conclusion that § 233(a) does not constitute an explicit declaration that the FTCA is a substitute for *Bivens* actions is supported by the history of the legislation in question. That history demonstrates that the exclusivity provision of § 233(a) was intended to preempt a particular set of tort law claims related to medical malpractice.

Although codification can produce the illusion of a timeless, unitary law, statutes are passed in particular historic and legal contexts and their language must be read and interpreted with that context in mind. "[O]ur evaluation of congressional action in 197[0] must take into account its contemporary legal context."[9] *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *see also Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 411, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) (describing courts' "obligation to honor the clear meaning of a statute,

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[9] Public context is especially important in examining "Congress's enactment (or re-enactment) of . . . verbatim statutory text." *Alexander v. Sandoval*, 532 U.S. 275, 288, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). In this case, the key preemptive phrase, "exclusive of any other civil action or proceeding by reason of the same subject matter against the employee," was identical to language in the Federal Drivers Act, which at the time provided that the FTCA was the exclusive remedy "for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. § 2679(b) (1970). If constitutional tort suits against Public Health Service officers and employees, arising out of performance of their medical duties, seemed like a remote possibility in 1970, they would have seemed positively Dada for suits against drivers of motor vehicles in 1961. *See* Pub.L. No. 87-258, 75 Stat. 539 (1961).

as revealed by its language, purpose, *and history*") (emphasis added); *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24, 11 L.Ed. 469 (1845) (stating that courts interpreting legislation should look, "if necessary, to the public history of the times in which it was passed"). Thus, although the term "any other civil action or proceeding" may appear clear in a historical isolation, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

As the Court noted in *Carlson*, the FTCA was enacted long before *Bivens* recognized a right of action under the Constitution. 446 U.S. at 19, 100 S.Ct. 1468. Section 233(a), too, predated *Bivens*: it was passed December 31, 1970, almost six months before *Bivens* was decided the following June, and almost six years before the Supreme Court's decision in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), established the "deliberate indifference" standard for prisoner medical care under the Eighth Amendment. Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, 84 Stat. 1868 (1970). It is therefore unsurprising that § 233(a) says nothing about preempting direct constitutional remedies—such remedies were not recognized at the time of its passage. An ordinary reader, at the time of § 233(a)'s passage, would have understood "any other civil action or proceeding" with respect to "personal injury, including death, resulting from the performance of medical, surgical, dental, or related

functions" to refer instead to a host of common-law and statutory malpractice actions.[10]

This understanding is borne out by the legislative history of § 233(a), which reveals that Congress's exclusive concern was with common law malpractice liability. The only two statements on the floor of either house of Congress respecting the bill mentioned only medical malpractice, with nothing being said about constitutional violations. *See* 91 Cong. Rec. H42,543 (1970) (statement of Rep. Staggers) ("So they have asked, if in the event there is a suit against a PHS doctor alleging malpractice, the Attorney General of the United States would defend them in whatever suit may arise."); 91 Cong. Rec. S42,977 (1970) (statement of Sen. Javits) ("I am pleased to support . . . the provision for the defense of certain malpractice and negligence suits by the Attorney General."). Representative Staggers noted that the Surgeon General had requested the amendment because PHS physicians "just cannot afford to take out the customary liability insurance as most doctors do." 91 Cong. Rec. H42,543. The section itself was titled in the Statutes at Large[11] "Defense

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[10] At oral argument, *amicus* the United States noted that while the Supreme Court had not decided *Bivens* when § 233(a) was passed, it had already granted *certiorari* in the case the previous June. *See* 399 U.S. 905, 90 S.Ct. 2203, 26 L.Ed.2d 559 (1970). This does not make the directive more "explicit"; at best, it introduces a further element of ambiguity as to whether § 233(a) was intended to preempt constitutional claims.

[11] When § 233 was codified in the United States Code, it was given the title "Exclusiveness of Remedy." *See* 42 U.S.C. § 233. Title 42 of the U.S.C., however, has not been enacted into positive law. *See* 1 U.S.C. § 204 note. To the extent title or heading can affect our reading of otherwise ambiguous statu-

of Certain Malpractice and Negligence Suits." 84 Stat. at 1870; *see Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) ("[T]he title of a statute and the heading of a section are tools available for a resolution of a doubt about the meaning of a statute.") (internal quotation marks omitted). Thus, not only is the authoritative text of the statute silent as to constitutional torts in particular, but the title and legislative history, if anything, indicate an exclusive concern with state malpractice claims.[12]

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tory language, then, it is the Statutes at Large that provide us with the "legal evidence of [the] law [ ]." *U.S. Nat'l Bank of Oreg. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n. 3, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

[12] We disagree with PHS Defendants' and *amicus* the United States' contention that "malpractice" here encompasses cruel and unusual punishment or violations of due process under the Eighth or Fifth Amendments, respectively. As we have noted, it certainly did not in 1970. The term *malpractice*, in ordinary speech, even now connotes negligence or incompetence in performing one's professional duties. *See Black's Law Dictionary* 978 (8th ed. 2004) (defining "malpractice" as synonymous with "professional negligence" and "medical malpractice" as a "doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances"). In *Estelle v. Gamble*, the Supreme Court stressed the difference between malpractice and an Eighth Amendment violation: "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." 429 U.S. at 106, 97 S.Ct. 285.

While the acts giving rise to a constitutional action might also give rise to one for malpractice, the two are nonetheless quite distinct. In *Bivens*, the Supreme Court rejected a view of

Subsequent congressional action has revealed no inclination to make the FTCA a substitute remedy for *Bivens* actions. *See Brown & Williamson*, 529 U.S. at 143, 120 S.Ct. 1291 ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings."). The FTCA itself has been modified to add an express exclusivity provision and to provide that the provision does not bar actions for constitutional torts. In response to the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292,

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"the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens," noting that an "agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 391-92, 91 S.Ct. 1999.

That observation is particularly relevant here. To describe the allegations in the complaint as averring mere "malpractice" is to miss the point. Castaneda was not a walk-in patient at Defendants' clinic; neither are Defendants merely alleged to have misread a chart or fumbled a scalpel. The ordinary doctor, no matter how careless, does not hold her patients under lock and key, affirmatively preventing them from receiving the medical care they need and demand. Even when denying his requests for a biopsy in the fall of 2006, DIHS officials were aware that Castaneda "is not able to be released to seek further care due to mandatory hold and [,] according to ICE authorities, may be with this facility for a while." The Kafkaesque nightmare recounted in Plaintiffs' complaint, which we assume here to be true, draws its force not only from Defendants' alleged deliberate indifference, but also from Castaneda's *state-imposed helplessness* in the face of that indifference. The element of state coercion transforms this into a species of action categorically different from anything Congress would likely term "malpractice."

299, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988),[13] Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (LRTCA), Pub.L. No. 100-694 (1988). The LRTCA expanded 28 U.S.C. § 2679(b), which previously made the FTCA the exclusive remedy for injury resulting from a federal employee's operation of a motor vehicle, to encompass *any* "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1). Because, under the FTCA, the United States is substituted as the defendant in place of employees acting within the scope of their official duties, the LRTCA acts as a general grant of immunity to government employees for all such acts. The amendment went on to clarify that general immunity "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(A). In so doing, Congress made explicit what, when *Carlson* was decided, had previously been implicit: that "constitutional claims are outside the purview of the Federal Tort Claims Act." *Billings v. United States*, 57 F.3d 797, 800 (9th Cir.1995). It would defy logic to suppose that § 233(a) must be read, despite the lack of any statutory language or legislative history counseling such a reading, to

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[13] In *Westfall*, the Supreme Court held that "absolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." 484 U.S. at 300, 108 S.Ct. 580.

smuggle them back in again for this one subset of defendants.

What is more, the legislative history of the LRTCA makes it clear that Congress viewed the general grant of immunity it was extending to all employees, which expressly exempted constitutional claims, to be identical to the immunity it had already extended to PHS officers and employees sixteen years earlier.[14] The House Report, in discussing the effect of the LRTCA, noted:

> There is substantial precedent for providing an exclusive remedy against the United States for the actions of Federal employees. Such an exclusive remedy has already been enacted to cover the activities of certain Federal employees, including . . .
>
> . . .
>
> 3. Medical Personnel.—The FTCA is the exclusive remedy for medical or dental malpractice on the part of the medical personnel of most federal employees.

H.R.Rep. No. 100-700, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948 (citing 42 U.S.C. § 233). The same Report noted the "sharp distinction between common law torts and constitutional or *Bivens* torts" and suggested that a constitutional tort involves "a more serious intrusion of the rights of an individual that merits special attention." *Id.* at

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[14] *Cf. Carlson*, 446 U.S. at 19-20, 100 S.Ct. 1468 (examining legislative history of subsequent amendments to the FTCA to determine whether Congress viewed it as a substitute or complementary remedy).

6, 1988 U.S.C.C.A.N. at 5950. The Report emphasized that the "'exclusive remedy' provision . . . [was] intended to substitute the United States as the sole [] permissible defendant in all *common law* tort actions," *id.*, but declared that the provision "expressly does not extend to . . . constitutional torts," *id.* at 5949.

Testifying before the House Committee on the Judiciary, a senior Justice Department official stated:

> [T]he exclusive remedy provision [of § 2679(b)(1)] is based on a very well-established precedent. Seven such exclusive remedy provisions already exist. They apply to drivers of vehicles, to physicians employed by various agencies, and to Department of Defense attorneys.
>
> [The LRTCA] simply extends those provisions to all Federal employees. Because of this precedent, we have considerable experience with such exclusive remedy provisions. They work well and fairly, have been widely accepted, and are not controversial.

Legislation To Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Government Relations of the H. Comm. on the Judiciary, 100th Cong. 58 (1988) (testimony of Robert L. Willmore, Deputy Assistant Attorney General) (hereinafter Willmore Testimony). In the very next breath, however, the Deputy Assistant Attorney General agreed that "we want to avoid the constitutional torts issue." *Id.*; *see also id.* at 76 (statement of Willmore) ("H.R. 4358 would do nothing more than

extend the protection now enjoyed by doctors, drivers, and [Defense Department] attorneys to all federal employees."), 78-79 (describing legislation to make the FTCA exclusive of *Bivens* claims as "controversial").

The PHS Defendants argue that to construe § 233(a) to preempt only common law and statutory tort actions would render it superfluous, since, post-LRTCA, PHS officers and employees are already immune from those actions under § 2679(b)(1). Even if § 233 were now superfluous because of the subsequent enactment of the LRTCA some 18 years later, it unquestionably was not superfluous at the time it was enacted.

We would certainly hesitate to read a statute in a manner that would leave an entire subsection superfluous, and we do not do so here. *See Christensen v. Comm"r*, 523 F.3d 957, 961 (9th Cir.2008) ("We should avoid an interpretation that would render [entire] subsections redundant."). The canon against redundancy is rooted in the notion (perhaps aspirational) that Congress would not do anything as preposterous as to pass a statute that was, in part or in whole, a nullity *ab initio*. *Cf. Int'l Ass'n of Machinists & Aerospace Workers v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1057 (9th Cir.2004) ("'[A]bsent clear congressional intent to the contrary, the legislature did not intend to pass vain or meaningless legislation.'") (quoting *Coyne & Delany Co. v. Blue Cross & Blue Shield of Va.*, Inc., 102 F.3d 712, 715 (4th Cir.1996)) (alterations omitted). The presumption applies more weakly in situations, like this one, in which the provision is potentially rendered superfluous by language contained in a

separate, later statute. *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir.1991) (we must "mak[e] every effort not to interpret a provision in a manner that renders other provisions *of the same statute* inconsistent, meaningless or superfluous.") (emphasis added). Indeed, "[r]edundancies across statutes are not unusual events in drafting," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992), and it would not be surprising to a frequent reader of federal statutes that Congress might pass a later, more comprehensive statute that has the effect of rendering an earlier statute redundant, at least in part.[15] The Supreme Court has already held that § 2679(b) applies to all federal employees, regardless of whether they were covered by pre-LRTCA immunities. *See United States v. Smith*, 499 U.S. 160, 172-73, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991) ("The Liability Reform Act's plain language makes no distinction between em-

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[15] *See Germain*, 503 U.S. at 256, 112 S.Ct. 1146 (O'Connor, J., concurring in the judgment) ("I think it far more likely that Congress inadvertently created a redundancy than that Congress intended to withdraw appellate jurisdiction over interlocutory bankruptcy appeals by the roundabout method of reconferring jurisdiction over appeals from final bankruptcy orders."); *Zorich v. Long Beach Fire Dep't & Ambulance Serv., Inc.*, 118 F.3d 682, 686 (9th Cir.1997) (holding that a later, more general statute did not render a prior one superfluous because they provide "two separate means of qualifying for coverage"); *cf.* 2B Normal J. Singer, Sutherland Statutes and Statutory Construction § 51:5 (7th ed. 2007) ("A later general act may be held to supercede a prior narrower one where the later act purports to deal comprehensively with the subject to which it pertains.").

ployees who are covered under pre-Act immunity statutes and those who are not.").[16]

In any event, we disagree that our reading makes the text of § 233(a) superfluous, post-LRTCA. A review of the rest of § 233 reveals why: subsection (a) remains the lynchpin of the entire balance of the section. *See Dolan v. United States Postal Serv.*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). Other subsections of § 233 have extended subsection (a) protection to private persons and entities (who are not otherwise "employees" covered by FTCA) by stating that they are to be "deemed to be

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[16] In *Smith*, the pre-LRTCA immunity in question was the Gonzalez Act, 10 U.S.C. § 1089(a), which, like § 233(a), provides that the FTCA is the exclusive remedy for personal injury caused by armed forces physicians. Below, this court, joining the Eleventh Circuit, held that § 1089(a) granted immunity only for torts occurring in the United States. *See Smith v. Marshall*, 885 F.2d 650, 652-54 (9th Cir.1989); *Newman v. Soballe*, 871 F.2d 969, 974 (11th Cir.1989). The Supreme Court reversed, holding that, regardless of whether the Gonzalez Act would immunize foreign conduct, the LRTCA did, and the individual defendants were therefore immune. *United States v. Smith*, 499 U.S. at 172, 111 S.Ct. 1180.

Smith thus presented the opposite question from that posed here: in *Smith*, the pre-LRTCA immunity statute purportedly contained an exception to immunity not present in the LRTCA; in our case, PHS Defendants argue that the LRTCA contains an exception to immunity not in the pre-LRTCA immunity statute. Because we hold that § 233(a) does not provide an immunity for *Bivens* torts, *Smith* is of little relevance to us here beyond the proposition for which we cite it in the text above.

an employee of the Public Health Service."[17] Still other subsections involve the administration and limitation of this preemption.[18] Section 233(a), by defining the scope of immunity granted uniquely to PHS employees (respecting only "the performance of medical, surgical, dental, or related functions"), allows PHS and the Attorney General to provide a limited grant of immunity to volunteers and recipients of federal funds. After the LRTCA, then, the ongoing function of § 233, read as a whole, is to extend the FTCA exclusivity to private entities, much like many other statutes scattered throughout the U.S.Code. *See, e.g.*, 23 U.S.C. § 510(g)(1) (immunizing official acts by employees of National Academy of Sciences carrying out the future strategic highway research program); 42 U.S.C. § 5055(f)(1)(A) (volunteers of the Domestic Volunteer Services); 42 U.S.C. § 247d-6a(d)(2)(A) (Health and Human Services contractors involved in research and development activities related to "qualified countermeasures" against certain weapons of mass destruction); 50 U.S.C. § 2783(b)(1) (government contractors under Atomic Testing Liability Act). It would, indeed, be superfluous to add an explicit exemption for such "deemed" employees

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[17] *See* § 233(g) (operators of health centers receiving federal funds under 42 U.S.C. § 254(b), (j)) (officers, employees, or contractors of health center operators), (m) (managed care plans entering into contracts with health centers), (o) (health professionals volunteering at free clinics), (p) (professionals carrying out smallpox countermeasures in the event of "bioterrorist incident" or other emergency).

[18] *See, e.g.*, § 233(h) (qualifications for designation under subsection (g)), (k) (estimation of annual claims and establishment of fund), (n) (reports to Congress detailing United States' risk exposure by virtue of deemed employees).

from *Bivens* actions because such private actors are not subject to *Bivens* actions. *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001).

c. Context

In addition to historical context, individual statutes are located within a greater statutory and remedial context. We must "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *United States v. Alghazouli*, 517 F.3d 1179, 1184 (9th Cir.2008) (quoting *Comm'r v. Engle*, 464 U.S. 206, 217, 104 S.Ct. 597, 78 L.Ed.2d 420 (1984)). As we have noted, § 233(a) is not the only statute that makes the FTCA the exclusive remedy for injuries committed by certain classes of federal employees (although their meaning is not before us here). Most, like § 233(a), concern federal medical personnel. Some expressly limit themselves to actions involving "malpractice or negligence." 22 U.S.C. § 2702(a)(1) (State Department medical personnel); 38 U.S.C. § 7316(a)(1)(A) (Veterans Health Administration). Others specify in the text only a "negligent or wrongful act or omission." 10 U.S.C. § 1089(a) (Department of Defense, Armed Forces Retirement Home, and Central Intelligence Agency medical personnel); 42 U.S.C.A. § 2458a (NASA). Additionally, Department of Defense lawyers are given immunity for any "negligent or wrongful act or omission" connected with their provision of legal services. 10 U.S.C. § 1054(a). All, like § 233(a), mention "malpractice" in their title. All of these classes of employee might, absent § 2679(b)(1), face substantial

common law and statutory malpractice liability.[19] Granting these individuals, along with all federal employees driving motor vehicles (the former function of § 2679(b)), immunity from state negligence actions served a very real, obvious common purpose.[20]

PHS Defendants and *amicus* the United States, however, have provided no explanation for why Congress would want to provide these persons with the privilege, shared with no other federal employees, to *violate the Constitution* without consequence. *See Malesko*, 534 U.S. at 76, 122 S.Ct. 515 (Stevens, J., dissenting) ("Nor have we ever suggested that a category of federal agents can commit Eighth Amendment violations with impunity."). Why should the physicians who treat our soldiers' families[21] be im-

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[19] Notably, all the above statutes were passed well before the LRTCA gave a general grant of immunity to federal employees, with the exception of 38 U.S.C. § 7316, which was added in 1991. *Department of Veterans Affairs Health-Care Personnel Act of 1991*, Pub.L. No. 102-40, 105 Stat. 187 (1991).

[20] *See* Willmore Testimony at 76 (describing pre-LRTCA immunities as allowing "the United States . . . to develop a consistent and uniform approach to medical malpractice and automobile tort litigation—two of the most common types of common law torts").

[21] Military personnel themselves are generally unable to bring *Bivens* actions for injuries that "'arise out of or are in the course of activity incident to service.'" *United States v. Stanley*, 483 U.S. 669, 683, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) (quoting *Feres v. United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152 (1950)). Notably, although it was ultimately disposed of on other grounds, at no point in the *Stanley* litigation, which involved U.S. Army physicians' secret experimentation with LSD on unsuspecting soldiers, does it appear that it occurred to anyone to invoke 10 U.S.C. § 1089.

mune from constitutional torts while the physicians who treat our veterans are not? Why distinguish the Bureau of Prisons medical personnel who allowed a man in federal custody to die in *Carlson* from the PHS personnel who allegedly relegated a man in immigration detention to a similar outcome here? What is it about Department of Defense attorneys, alone among our government's legions of legal personnel, that they deserve such solicitude?

The LRTCA was passed to abolish such arbitrary distinctions. In his written statement to Congress, the Deputy Assistant Attorney General noted the absurdity of treating doctors, drivers, and Defense Department lawyers differently from all other federal employees. "For example, lawyers involved in Department of Commerce contracting should be protected from personal liability for their professional advice, just like their counterparts in the Department of Defense." Willmore Testimony at 76. Yet twenty years later, his successors at the Justice Department would have us re-introduce the exact same disparity in miniature, immunizing one set of doctors and lawyers from *Bivens* liability, and leaving the rest on the hook.

Had Congress intended this result, it surely would have said so—in the statute itself, in its title, or in the legislative history. Instead, the statute is silent as to the Constitution, and both the title and contemporary and subsequent legislative history suggest that Congress intended to preclude only common law malpractice claims. This cannot be what the Supreme Court meant by an explicitly declared substitute. We therefore hold that § 233(a) does not explicitly declare the FTCA to be a substi-

tute remedy for *Bivens* actions against PHS officers and employees.

3. *Cuoco v. Moritsugu*

We recognize that our holding in this case conflicts with the Second Circuit's decision in *Cuoco v. Moritsugu*, 222 F.3d 99. In *Cuoco*, the court relied on dicta in *Carlson* which it read to imply that § 233(a) was an expressly declared substitute for *Bivens*. *Id.* at 108. In *Carlson*, the Supreme Court wrote that its conclusion that the FTCA complements *Bivens*, rather than replaces it,

> is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U.S.C. § 4116(a), *42 U.S.C. § 233(a)*, 42 U.S.C. § 2458a, 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (malpractice by certain Government health personnel); 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); and 42 U.S.C. § 247b(k) (manufacturers of swine flu vaccine).

446 U.S. at 20, 100 S.Ct. 1468 (emphasis added). In the middle of a discussion about *Bivens* preemption, it is easy to skip over what, buried in a string citation, the Supreme Court actually said was preempted under § 233(a), et al., i.e., actions for "malpractice." Indeed, the Court also cited 38 U.S.C. § 4116(a) (1980), which by its terms expressly limited Veterans Health Administration medical personnel's immunity to actions "allegedly arising from malprac-

tice or negligence."[22] Moreover, before the passage of the LRTCA's general "exclusive remedy" provision, the enumerated statutes were the *only* statutes that provided that the FTCA to be exclusive of any remedy. We believe that the better reading of the Court's dictum in *Carlson* is that just as Congress, through certain statutes, made the FTCA a substitute remedy for medical malpractice actions, so it could—but did not—declare the FTCA to be a substitute remedy for federal constitutional claims.

Cuoco also failed to discuss whether Congress viewed the remedies provided under the FTCA as "equally effective" as those provided under *Bivens*, a question that the *Carlson* Court explicitly answered in the negative. Because, under *Carlson*, compliance with its "equally effective" prong is a necessary precondition for holding a statutory remedy to be a substitute for a *Bivens* cause of action, *Cuoco*'s failure to address that prong or the answer provided by *Carl-*

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[22] *Cuoco* found this express limitation in § 4116(a)'s modern successor, 38 U.S.C. § 7316(a)(1), to be meaningful for interpreting § 233(a).

> Because § 7316(a)(1) mentions "malpractice or negligence," and § 233(a) does not, the Second Circuit held that § 233(a)'s reach extended to constitutional torts as well. 222 F.3d at 108. The Second Circuit did not mention the presence of the term "malpractice" in § 233(a)'s title, perhaps over-looked, since that title does not appear in the United States Code. At any rate, we believe that Supreme Court did not find that omission to be a critical difference in *Carlson*, citing the two statutes, one right after the other, as both standing for the proposition that the FTCA is the exclusive remedy for "malpractice by certain Government health personnel." 446 U.S. at 20, 100 S.Ct. 1468.

son is contrary to governing Supreme Court precedent. Accordingly, we cannot agree with the Second Circuit's analysis or application of *Carlson*.

B. Do "Special Factors" Exist Here Warranting a Finding of Implicit Preemption?

Both the Supreme Court and this court have recognized that even where Congress fails to explicitly declare a remedy to be a substitute for recovery directly under the Constitution or to provide a remedy that is as effective a remedy for a constitutional tort, a *Bivens* action may still be precluded. As *Carlson* noted, a *Bivens* action will not lie "when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.'" 446 U.S. at 18, 100 S.Ct. 1468 (quoting *Bivens*, 403 U.S. at 396, 91 S.Ct. 1999). "The presence of a deliberately crafted statutory remedial system is one 'special factor' that precludes a *Bivens* remedy." *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir.1997). PHS Defendant Cmdr. Henneford and the United States contend that, even if § 233(a) is not an explicit substitution of the FTCA for *Bivens*, it nonetheless constitutes a "deliberately crafted statutory remedial system," *id.*, [Henneford Br. at 31] such that we ought to find that the FTCA impliedly displaces *Bivens* for suits against PHS officers and employees.

Neither Cmdr. Henneford nor any other PHS Defendant appears to have raised any argument based on the presence of "special factors" before the district court. "Generally, in order for an argument to be considered on appeal, the argument must have been raised sufficiently for the trial court to rule on it." *A-*

1 Ambulance Serv., Inc. v. County of Monterey, 90 F.3d 333, 338 (9th Cir.1996).[23]

In any case, we reject this argument as well. First, while the Supreme Court and this court have subsequently found various other remedial schemes to be "special factors" precluding *Bivens* relief, *see, e.g.*, *Chilicky*, 487 U.S. at 425, 108 S.Ct. 2460; *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir.1989), those decisions have not overruled *Carlson*'s square holding that there are no special factors that preclude a *Bivens* action in a case whose facts and posture mirror this one. 446 U.S. at 19, 100 S.Ct. 1468 (holding that "the case involves no special factors counseling hesitation in the absence of affirmative action by Congress"). As noted earlier, here, as in *Carlson*, we have an individual who has died, allegedly due to the deliberate indifference of the federal officials charged with his health and safety. As in *Carlson*, the decedent's survivors bring a *Bivens* action premised on violations of the Fifth and Eighth Amendments, and the officials argue that no *Bivens* remedy is available. Because the present case is functionally identical to *Carlson*, *Carlson*'s holding that no special factors preclude *Bivens* relief is binding on this court.[24]

Second, "*Chilicky* and *Kotarski* hold that courts should not create a *Bivens* remedy where the complexity of a federal program, including a comprehen-

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[23] For this reason, we will not pass on Cmdr. Henneford's assertion in his opening brief that the complaint does not aver sufficient facts to establish his personal involvement in the alleged constitutional deprivation.

[24] For the same reason, our decision does not extend *Bivens* into a new context. *Cf. Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001).

sive remedial scheme, shows that Congress has considered the universe of harms that could be committed in the program's administration and has provided what Congress believes to be adequate remedies." *Adams*, 355 F.3d at 1185. The FTCA is not such a scheme, for the simple reason that it does not provide remedies that Congress believes to be adequate: It provides the remedies that individual *states* believe to be adequate remedies for common law torts. Congress did not "deliberately craft" "a comprehensive remedial scheme" when it adopted the FTCA's remedies; rather, it delegated the underlying remedies to state legislatures and courts. We do not believe that Congress intended to delegate to the states the mechanism by which violations of federally established rights are remedied. As noted above, the remedies we and the Supreme Court have held to preclude *Bivens* were deliberately crafted by Congress and applied uniformly throughout the republic. We are aware of no case holding a remedial scheme that is entirely parasitic on state law to be a substitute for a *Bivens* remedy. Instead, the Supreme Court has announced its skepticism regarding any such remedial scheme: "The question whether [an] action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution." *Carlson*, 446 U.S. at 23, 100 S.Ct. 1468. Accordingly, the statutory remedies provided in the FTCA do not constitute a comprehensive remedial scheme and cannot serve as a "special factor" precluding *Bivens* relief.[25]

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[25] Defendants point to no other special factors counseling

Conclusion

We agree with the district court that § 233(a) does not entitle the PHS Defendants to absolute immunity from constitutional torts.[26]

AFFIRMED.

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hesitation in the present case. This is to be expected, because Castaneda "seek[s] a cause of action against an individual officer, otherwise lacking, as in *Carlson*." *Malesko*, 534 U.S. at 74, 122 S.Ct. 515. The case does not involve any of the other special factors that the Supreme Court has held preclude *Bivens* relief: a lawsuit against a federal agency or private corporation, *see Malesko*, 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456; *FDIC v. Meyer*, 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); the "unique disciplinary structure of the Military Establishment," *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987); *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); or a constitutional claim that cannot be defined into "a workable cause of action," *Wilkie v. Robbins*, ___U.S. ___, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007). Defendants simply ask us to revisit *Carlson*'s holding that the FTCA is not a "special factor." This we decline to do.

[26] Because *Carlson* requires us to affirm, as discussed throughout this opinion, we need not reach the issues of statutory construction which underlie the district court's opinion.

APPENDIX B

UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA

Case No. CV 07-07241 DDP (JCx).

Francisco CASTANEDA, Plaintiff,

v.

The UNITED STATES of America, George Molinar, in his individual capacity, Chris Henneford, in his individual capacity, Gene Migliaccio, in his individual capacity, Timothy Shack, M.D., in his individual capacity, Esther Hui, M.D., et al., Defendants.

March 11, 2008

AMENDED ORDER DENYING
MOTION TO DISMISS
[Motion filed on January 14, 2008]

DEAN D. PREGERSON, District Judge.

This matter comes before the Court upon the individual Public Health Service Defendants' motion to dismiss for lack of subject matter jurisdiction. After

reviewing the materials submitted by the parties and reviewing the arguments therein, the Court DENIES the motion.[1]

I. LEGAL STANDARD

When reviewing a motion to dismiss, the Court "assum[es] all facts and inferences in favor of the non-moving party." *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir.2003). In addition, where, as here, the motion to dismiss is based upon an alleged lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), "the trial court may rely on affidavits and other evidence submitted in connection with the motion." *Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37, 39 (9th Cir.1978).

II. BACKGROUND

On March 27, 2006, Plaintiff Francisco Castaneda—an immigration detainee—informed the Immigration and Customs Enforcement ("ICE") medical staff at the San Diego Correctional Facility that a lesion on his penis was becoming painful, growing in size, and exuding discharge. The next day, Castaneda was examined by Anthony Walker, an ICE Physician's Assistant. Walker's treatment plan called for a urology consult "ASAP" and a request for a biopsy. (Amended Compl. 37[2]; Doyle Decl. Ex. 1.)

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[1] The initial order was issued with the Plaintiff's name spelled incorrectly. Other than that adjustment, this amended order is identical to the initial order.

[2] Defendants' motion to dismiss was filed before the Complaint was amended. However, the Amended Complaint contains no new allegations against the individual federal defendants and the parties have stipulated that Defendants' motion is responsive to the Amended Complaint.

On April 11, 2006, ICE documented that because of Castaneda's family history—his mother died of pancreatic cancer at age 39—penile cancer needed to be ruled out. (Doyle Decl. Ex. 2.) A Treatment Authorization Request ("TAR") was filed with the Division of Immigration Health Services ("DIHS"), requesting approval for a biopsy and circumcision. The TAR noted that Castaneda's penile lesion had grown, that he was experiencing pain at a level 8 on a scale of 10, and that the lesion had a "foul odor." (*Id.* Ex. 3.) By this time, DIHS had determined that certain "possible infections" were not causing the lesion. (*Id.*) The TAR further urged that, "[d]ue to family history and pt [patient] discomfort," a biopsy and "pertinent surgical f/u [follow up]" should be performed the "sooner the better." (*Id.*) DIHS approved the TAR, authorizing the biopsy, urology consult, and "pertinent surgical f/u," on May 31. (*Id.*)

On June 7, 2006, ICE sent Castaneda for a consult with oncologist John Wilkinson, M.D. Castaneda presented with a history of a fungating lesion[3] on his foreskin. (*Id.* Ex. 4.) Dr. Wilkinson

> agree[d] with the physicians at the [M]etropolitan [C]orrectional Center that this may represent either a penile cancer or a pro-

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[3] The National Cancer Institute defines a "fungating lesion" as: "A type of skin lesion that is marked by ulcerations (breaks on the skin or surface of an organ) and necrosis (death of living tissue) and that usually has a bad smell. This kind of lesion may occur in many types of cancer, including breast cancer, melanoma, and squamous cell carcinoma, and especially in advanced disease." *See* http://www.cancer.gov/Templates/dbalpha.aspx?print=1&cdrid=367427 (last accessed February 17, 2008).

> gressive viral based lesion. I *strongly agree that it requires urgent urologic assessment of biopsy and definitive treatment.* In this extremely delicate area and [sic] there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated. . . . I spoke with the physicians at the correctional facility. *I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost effective. They understand the need for urgent diagnosis and treatment.*

(*Id.* (emphasis added).) On the same day, Defendant Esther Hui, M.D., spoke to Dr. Wilkinson. She noted that she was aware that Mr. Castaneda "has a penile lesion that needs to be biopsied," and that Dr. Wilkinson had offered to admit Castaneda and perform this procedure. (*Id.* Ex. 5.) However, Dr. Hui explained that DIHS would not admit him to a hospital because DIHS considered a biopsy to be "an *elective* outpatient procedure." (*Id.* (emphasis added).) Dr. Hui never made arrangements for the outpatient biopsy.

On June 12, 2006, Castaneda filed a grievance asking for the surgery recommended by Dr. Wilkinson, stating that he was "in a considerable amount of pain and I am in desperate need of medical attention." (*Id.* Ex. 6.) This grievance was denied. DIHS records from June 23 document that Castaneda's penis was "getting worse, more swelling to the area, foul odo[r], drainage, more difficult to urinate, bleeding from the foreskin." (*Id.* Ex. 7.) DIHS records from June 30, 2006 state that because Castaneda had not

yet had "a biopsy performed and evaluated in a laboratory," the agency considered him to "NOT have cancer at this time." (*Id.* Ex. 8.) DIHS acknowledged that "the past few months of the lesion [had been] looking and acting a bit more angry," yet dismissed Castaneda's concerns: "Basically, this pt needs to be patient and wait." (*Id.*)

DIHS records from one month later document that the "lesion on his penis is draining clear, foul malodorous smell, culture[s] before were negative for growth, negative RPR, negative HIV. [F]oreskin is bleeding at this time and pt states his colon feels swollen, previous rectal exam showed slightly swollen prostate, deferred today." (*Id.* Ex. 9.) Despite Dr. Wilkinson's emphasis over a month earlier on the need for a biopsy due to the considerable likelihood of cancer, DIHS claimed to have no idea what could be causing Castaneda's ailment, noting the "unk[nown] etiology of [his] penile lesion." (*Id.* Ex. 9.)

On the same day, a report by Anthony Walker claims that Castaneda "was not denied by Dr. Hui any treatment, albeit there was no active Treatment Authorization Request (TAR) placed for approval by DIHS headquarters in Washington, DC, *nor was there an emergent need.*" (*Id.* Ex. 10 (emphasis added).) Despite the alleged lack of "emergent need," the next day a TAR was submitted seeking Emergency Room ("ER") evaluation and in-patient treatment for Castaneda. There is no explanation for why ICE did not schedule him for the circumcision and biopsy ordered by Dr. Wilkinson the month before. However, the TAR did note that Dr. Wilkinson and Dr. Masters, an outside urologist,

> both *strongly recommended* admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant, return f/u with oncology depending upon findings, and potential treatment or surgery of any malignant findings. . . . There is now bleeding, drainage, malodorous smell and the lesion now appears to be "exploding" for lack of better words, definitely macerated. Request for urology and oncology *inpatient* eval[uation] and treatment with outpatient follow-up.

(*Id.* Ex. 11 (emphasis added).) The TAR was approved. (*Id.*)

Inexplicably, DIHS failed to arrange for an evaluation with Dr. Wilkinson and/or Dr. Masters, the treating doctors who were familiar with Castaneda's condition and who, indeed, had offered to continue treating him. Instead, DIHS brought Castaneda to the ER at Scripps Mercy Chula Vista on July 13, 2006. There, Dr. Juan Tovar, M.D., who examined Castaneda, documented the existence of a 1.5cm by 2cm "fungating lesion with slight clearish discharge." (*Id.* Ex. 12.) Dr. Tovar made arrangements for Castaneda to be admitted to the hospital; his impression was that Castaneda had a "penile mass" and that there was a need to "rule out cancer, versus infectious etiology." (*Id.*)

Once admitted, yet another doctor unfamiliar with Castaneda's history, Dr. Daniel Hunting, M.D., performed a brief examination the same day, but *did not* do the biopsy needed to rule out cancer. Instead, Dr. Hunting guessed that the problem was condy-

loma, commonly known as genital warts. (*Id.* Ex. 13.) There is no evidence from his report that Dr. Hunting asked about or was aware of Castaneda's family history of cancer. Dr. Hunting then referred Castaneda back to his "primary treating urologist," dismissed his symptoms as "not an urgent problem," and discharged him from the hospital. (*Id.*)

Four days later, Castaneda's condition was worsening. DIHS documented that the lesion was still "growing," and that Castaneda had "severe phimosis,[4] bleeding, and clear drainage for lesion area with foul odor." (*Id.* Ex. 14.) The DIHS record notes that both Dr. Masters and Dr. Wilkinson "strongly recommended" admission to a hospital, biopsy, and circumcision. (*Id.*) Instead, DIHS followed the suggestion of Dr. Hunting—who had only briefly examined Castaneda in the ER—and assumed Castaneda had genital warts. DIHS therefore declined to order a biopsy, although it nonetheless noted Castaneda would "need a resection[5] of the penis" due to the severity of his condition. (*Id.*)

On July 26, 2006, DIHS acknowledged that Castaneda "complains that he is being denied a needed surgery to his foreskin." (*Id.* Ex. 16.) ICE told Castaneda, however, that "while a surgical procedure

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[4] Phimosis is medically defined as a "tightness or construction of the orifice of the prepuce arising either congenitally or from inflammation, congestion, or other postnatal causes and making it impossible to bare the glans." *Merriam Webster's Medical Desk Dictionary* 613 (1996). In other words, the foreskin is so tight it cannot be pulled back completely to reveal the glans.

[5] Resection means the surgical removal of part of an organ. *Webster's Medical Desk Dictionary* at 697.

might be recommended long-term, that does not imply that the Federal Government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight." (*Id.*) On August 9, DIHS again noted Plaintiff's "inflamed foreskin," but denied his request for a circumcision, claiming that "surgical removal, at the current time, would be considered elective surgery; that as such the Federal Government will not provide for such surgery." (*Id.* Ex. 17.)

On August 11, 2006, Walker submitted a TAR requesting a biopsy and circumcision by Dr. Masters, the outside urologist. (*Id.* Ex. 18.) Dr. Masters examined Castaneda on August 22. Dr. Masters thought Castaneda might have genital warts, but noted Castaneda's family history of cancer and that Dr. Wilkinson had recommended a "diagnostic biopsy" to rule out cancer. (*Id.* Ex. 19.) Therefore, Dr. Masters recommended circumcision, which would at once relieve the "ongoing medical side effects of the lesion including infection and bleeding" and "provide a biopsy." (*Id.*) Dr. Masters told DIHS that "we will arrange for admission for circumcision at a local hospital. My principal hospital is Sharp Memorial." (*Id.*)

In spite of this unequivocal recommendation, Walker characterized Dr. Masters as stating that "elective procedures this patient may need in the future are cytoscopy and circumcision." (*Id.* Ex. 20.) The word "elective" does not appear in Dr. Masters's report. DIHS denied the request for a circumcision. (*Id.*) On August 24, 2006, DIHS told Castaneda that, "according to policy," surgery was denied because it was "elective." (*Id.* Ex. 21.) On August 26 and 28, Castaneda was seen by medical staff because of

"complaints of stressful situation regarding medical status, unable to sleep at night; states that ICE won't allow surgical operation for lesion on penis." (*Id.* Ex. 22.) ICE was thus aware that Castaneda's "stress is due to a chronic medical problem which the CCA has refused to have corrected as it is considered to be elective surgery." (*Id.*) Castaneda was prescribed an anti-histamine as treatment. (*Id.*)

On August 30, 2006, ICE sent Castaneda a letter:

> This is to inform that the off-site specialist you were referred to for your medical condition reports that any surgical intervention for the condition would be elective in nature. An independent review by our medical team is in agreement with the specialist's assessment. The care you are currently receiving is necessary, appropriate, and in accordance with our policies.

(*Id.* Ex. 23.) As noted, Dr. Wilkinson's and Dr. Masters's reports do not in fact state that the recommended biopsy and circumcision would be elective. On the contrary, Castaneda's treating doctors, as discussed, both noted the urgency of the situation and made efforts to see Castaneda treated as quickly as possible.

On September 8, 2006, Castaneda complained: "I have a lot [sic] pain and I'm having discharge." (*Id.* Ex. 24.) ICE noted that Castaneda's current treatment was Ibuprofen (800mg), which was having "no effect" on his pain; Castaneda was having "white discharge at night," and he worried that "It's getting worse. It's like genital warts, but they're getting bigger." (*Id.*) By October 17, 2006, ICE medical staff was

aware that Castaneda was bleeding from his penis; one officer "saw some dried blood on his boxers." (*Id.* Ex. 26.) On October 23, Walker submitted a TAR for surgery, but it was denied on October 26 because "circumcisions are not a covered benefit." (*Id.* Ex. 27-28.)

In the October 26 denial report, Defendant Claudia Mazur, a DIHS nurse, stated that "Pt has been seen by local urologist and oncologist and both are not impressed of possible cancerous lesion(s), however, there is an elective component to having the circumcision completed." (*Id.* Ex. 28.) This conclusion directly contradicts the July 13 TAR, which documented that Drs. Wilkinson and Masters both "strongly recommended . . . surgical intervention via biopsy/exploration" to rule out cancer. (*Id.* Ex. 4, 11, 19.) The TAR also documented that Castaneda "is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite awhile." (*Id.* Ex. 28.) This document thus suggests ICE officials *knew* that Castaneda would be unable to receive treatment in the foreseeable future.

DIHS noted that Castaneda's symptoms "have worsened" on November 9. (*Id.* Ex. 29.) Castaneda reported "a constant pinching pain, especially at night. States he constantly has blood and discharge on his shorts. [Castaneda stated] it's getting worse, and I don't even have any meds—nothing for pain and no antibiotics." (*Id.*) Castaneda also "complains of a swollen rectum which he states make bowel movements hard." (*Id.*) Castaneda was told that the "TAR was in place for surgery and is pending approval." (*Id.*) Yet the surgery was not provided.

Instead, on November 14 and 15, DIHS documented that Castaneda "complains of new, 2nd penile lesion on underside, distal penis." (*Id.* Ex. 30.) ICE noted that Castaneda was concerned "that his lesion 'is growing' " and that it is "moist," that "he cannot stand and urinate because the urine 'sprays everywhere' and he cannot direct the stream." (*Id.*) DIHS treated this condition by making a request for seven pairs of clean boxer shorts weekly. (*Id.*)

In early December, Castaneda was transferred to the San Pedro Service Processing Center. (Jawetz Decl. Ex. 1.) ACLU lawyers began to advocate on his behalf. On December 5, 2006, the ACLU sent a letter to multiple ICE officials, including Defendants Chris Henneford, Stephen Gonsalves, and George Molinar. The letter stated, in part, that "Mr. Castaneda, who has a strong family history of cancer, legitimately fears that his long term health is being jeopardized by the lack of appropriate medical care he continues to receive in ICE custody. In the short term, Mr. Castaneda continues to experience severe pain, bleeding, and discharge." (*Id.*) The letter requested medical treatment for Castaneda.

Also on December 5, a TAR was filed seeking consultation with Lawrence Greenburg, M.D., because of a "history of severe HPV infection causing large, painful, penile warts, has bleeding and pain from the lesions. May also have an underlying structural deformity of penis." (Doyle Decl. Ex. 31.) Dr. Greenberg "also recommended a circumcision and biopsy." (Jawetz Decl. Ex. 5.) On January 19, an ACLU attorney faxed another letter to ICE, requesting medical treatment for Castaneda. (*Id.*) On January 24, a TAR for a urology consult with Asghar Askari, M.D. was

approved. (Doyle Decl. Ex. 32.) The next day, Castaneda was seen by Dr. Askari, who diagnosed a fungating penile lesion that was "most likely penile cancer" and ordered a biopsy. (*Id.* Ex. 33.)

On January 29, 2007, the ACLU faxed yet another letter to ICE, urging the agency to provide Castaneda the care that had been ordered for the past ten months. (Jawetz Decl. Ex. 6.) According to Plaintiff's complaint, a biopsy was finally scheduled for early February. However, a few days before the procedure, Castaneda was abruptly released from ICE custody. Castaneda then went to the ER of Harbor-UCLA Hospital in Los Angeles on February 8, 2007, where he was diagnosed with squamous cell carcinoma. His penis was amputated on Valentines Day, 2007. According to the complaint, Harbor-UCLA confirmed that Castaneda had metastatic cancer. Castaneda began undergoing chemotherapy at Harbor-UCLA. (Amended Compl. 104-09.) However, the treatment was not successful, and on February 16, 2008, Mr. Castaneda died.[6]

Plaintiff Castaneda brings this lawsuit against, *inter alia*, the United States and individual federal officials, arguing that the refusal to provide Castaneda with a biopsy despite numerous medical orders to do so violated the United States Constitution.[7]

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[6] A motion to substitute the representative and heirs of his estate as the proper parties, as well as to permit the filing of a second amended complaint, is currently pending before the Court. However, this motion does not affect the instant motion to dismiss, and the individual federal defendants—the moving parties in the instant motion—do not oppose the substitution.

[7] Plaintiff also brings claims against California state officials. These claims are not at issue in the instant motion.

Plaintiff brings state tort claims against the United States under the Federal Torts Claims Act ("FTCA"),[8] and alleges federal constitutional violations against the individuals pursuant to *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (establishing that victims of a constitutional violation by a federal agent may recover damages against that federal official in federal court).

The individual Public Health Service ("PHS") Defendants now bring this motion to dismiss for lack of subject matter jurisdiction.[9] They argue that the PHS Defendants are absolutely immune from suit, that Plaintiff must instead bring this claim as an FTCA action against the United States, and that because the United States has not waived sovereign immunity for claims of constitutional violations, this action must be dismissed.

III. DISCUSSION

This case presents an unresolved legal question in the Ninth Circuit: whether § 233(a) of the Public Health Service Act allows Castaneda to assert *Bivens* claims against the individual Public Health

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[8] The FTCA makes the federal government liable to the same extent as a private party for certain torts committed by federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1).

[9] These Defendants are Chris Henneford, Eugene Migliaccio, Timothy Shack, M.D., Esther Hui, M.D., and Stephen Gonsalves.

Service Defendants. The Court finds that the plain language of the statute dictates that it does.[10]

A. *Bivens* Claims are Generally Available to Remedy Eighth Amendment Violations, and the FTCA is Intended as a Parallel, Rather Than a Substitute Remedy

A victim of a constitutional violation by a federal agent may bring a *Bivens* action to recover damages against the individual in his personal capacity unless "defendants demonstrate special factors counseling hesitation in the absence of affirmative action by Congress" or unless "defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (internal quotation marks omitted). The only question before the Court is whether Congress has explicitly provided for a substitute remedy under the circumstances in this case, so as to preclude a *Bivens* claim.

The United States Supreme Court has made "crystal clear" that in cases involving Eighth Amendment claims based on an alleged failure to provide proper medical care, "Congress views FTCA

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[10] Plaintiff brings a *Bivens* claim alleging a violation of the Fifth Amendment's Equal Protection Clause as well as his Eighth Amendment claim for inadequate medical care. Because Defendants do not specifically argue that Plaintiff's Fifth Amendment claim is also preempted by § 233(a), the Court does not address the issue, except to note that its conclusion that § 233(a) allows an Eighth Amendment *Bivens* claim applies equally to any other *Bivens* claim.

and *Bivens* as parallel, complementary causes of action." *Id.* at 20, 100 S.Ct. 1468. In *Carlson*, the Court rejected defendants' argument that the FTCA was intended by Congress to be an adequate substitute:

> [W]e have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress. Petitioners point to nothing in the Federal Tort Claims Act (FTCA) or its legislative history to show that Congress meant to preempt a *Bivens* remedy or to create an equally effective remedy for constitutional violations.

Id. at 19, 100 S.Ct. 1468.

According to the Court, "[f]our additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit [the aggrieved individual] to an FTCA action." *Id.* at 20-21, 100 S.Ct. 1468. First, the threat of a *Bivens* claim provides stronger deterrence against future constitutional violations than an FTCA action because only the former remedy "is recoverable against individuals," and "[i]t is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." *Id.* at 21, 100 S.Ct. 1468 (internal citations omitted).

Second, and relatedly, punitive damages are available in a *Bivens* action, but are "statutorily prohibited" in an FTCA suit, *see* 28 U.S.C. § 2674, so

the "FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts." *Id.* at 22, 100 S.Ct. 1468. Moreover, because 42 U.S.C. § 1983—the counterpart to *Bivens* actions for constitutional violations by state officials—allows for punitive damages, "the constitutional design would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Id.* (internal quotation marks omitted).

Third, *Bivens* actions are more effective in this context because FTCA actions do not allow for jury trials. The Court found "significant[ ]" that plaintiffs should be able to retain the choice between courts and juries. *Id.* Fourth, and finally,

> an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred"). Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules. . . . The question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.

Id. at 23, 100 S.Ct. 1468. For all of the above reasons, the Court held that "[p]lainly FTCA is not a

sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy." *Id.*

Since the Court's opinion in *Carlson*, Congress has amended the FTCA to expressly preserve parallel *Bivens* actions against federal employees. In 1988, it passed the Federal Employees Liability and Tort Compensation Act, which, *inter alia*, provided the FTCA will be the "exclusive" remedy "of any other civil action or proceeding for money damages . . . against [a federal] employee." 28 U.S.C. § 2679(b)(1). However, the Act then explains that this exclusivity "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." *Id.* § 2679(b)(2)(A).

B. Both the Plain Language and the Legislative History of § 233(a) Evince a Congressional Intent to Preserve *Bivens* Actions

Defendants acknowledge that in general, victims of constitutional violations may proceed with both FTCA and *Bivens* claims. They nonetheless urge that as to the Public Health Service Defendants specifically, Congress has expressed an explicit intent, through the Public Health Service Act, to limit plaintiffs to an FTCA remedy. The Court disagrees.

Whether the Public Health Service Act evinces an intent to limit Mr. Castaneda's remedies against PHS Defendants for any constitutional violations to an FTCA claim is a question of statutory interpretation. When interpreting a statute, courts "look first

to the plain language of the statute, construing the provisions of the entire law." *Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 831 (9th Cir.1996) (internal quotation marks omitted). After that, "if the language of the statute is unclear, we look to the legislative history." *Id.* (internal quotation marks omitted). In this case, both the text and legislative history reveal an explicit intent to allow *Bivens* claims.

1. Plain Language

The pertinent provision of the Public Health Service Act, § 233(a),[11] reads in its entirety as follows:

> DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS
>
> Sec. 223. (a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the FTCA], or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while act-

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[11] The language of Public Law No. 91-623 has not been amended since enacted on December 31, 1970. However, the 1970 edition of the United States Code (where this statute first appeared in the Code) renumbered this section as "§ 233(a)." Although the accurate version is § 223(a) of the Public Health Service Act in the Statutes at Large, the Court will refer to the section as § 233(a) for ease of reference.

> ing within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, § 223(a), 84 Stat. 1868, 1870 (1970). From this provision, it is clear that Congress intended *some* medical injuries caused by PHS employees to be redressable solely through the FTCA. The question is whether the provision applies to allegations of constitutional violations. Congress has expressly indicated that it does not.

At first glance, it may appear that § 233(a) does not address one way or another whether Congress intended constitutional claims to come under its rubric. Upon following the statutory trail, however, it turns out that Congress has in fact explicitly answered the question presented by this case.

Subsection 233(a) declares that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of title 28, . . . shall be exclusive." The two sections mentioned—1346(b) and 2672—are part of the FTCA. The latter—entitled "Administrative Adjustment of Claims"—deals with how a federal agency may manage the claims against it, and is not relevant for our purposes. Subsection 1346(b), however, is more instructive:

> (b)(1) *Subject to the provisions of chapter 171 of this title*, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court

> of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(emphasis added).

One little clause, almost invisible, should attract our attention: "Subject to the provisions of chapter 171 of this title." This is the kind of clause that is often ignored, on the assumption that it is probably not relevant. But let us see what chapter 171 says, just in case:

> **CHAPTER 171-TORT CLAIMS PROCEDURE**
>
> 28 USCA Pt. VI, Ch. 171, Refs & Annos
>
> § 2671. Definitions
>
> § 2672. Administrative adjustment of claims
>
> § 2673. Reports to Congress
>
> § 2674. Liability of United States
>
> § 2675. Disposition by federal agency as prerequisite; evidence
>
> § 2676. Judgement as bar
>
> § 2677. Compromise
>
> § 2678. Attorney fees; penalty

§ 2679. Exclusiveness of remedy

§ 2680. Exceptions

The statutory provision that is the central focus of this motion to dismiss—§ 233(a)—thus explicitly incorporates by reference 28 U.S.C. § 2679. Subsection 2679(b) is dispositive here:

> **(b)(1)** The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> (2) *Paragraph (1) does not extend or apply to a civil action against an employee of the Government—*
>
> (A) *which is brought for a violation of the Constitution of the United States.*

28 U.S.C. § 2679 (emphasis added). Therefore, § 233(a) incorporates the provision of the FTCA which *explicitly* preserves a plaintiff's right to bring a *Bivens* action. Stated differently, far from evincing the explicit intent required by *Carlson* that Congress

intended to preclude *Bivens* claims, the plain language of § 233(a) unambiguously states the opposite:

> The [exclusive] remedy against the United States provided by sections 1346(b) and 2672 of title 28 . . . for damage for personal injury, including death, resulting from the performance of medical . . . or related functions . . . by any commissioned officer or employee of the Public Health Service . . . does not extend or apply to a civil action . . . which is brought for a violation of the Constitution of the United States.
>
> 42 U.S.C. § 233(a); 28 U.S.C. § 2679(b).

The United States Supreme Court, in interpreting a provision similar to § 233(a), has confirmed that the "the FTCA is not the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings: (1) a *Bivens* action." *United States v. Smith*, 499 U.S. 160, 166-67, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991); *see also Billings v. United States*, 57 F.3d 797, 800 (9th Cir.1995) (noting that "constitutional claims are outside the purview of the Federal Tort Claims Act"). *Smith* dealt with the Gonzales Act, which has a provision worded almost identically to § 233(a):

> **§ 1089. Defense of certain suits arising out of medical malpractice**
>
> **(a)** The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist,

> nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty . . ., the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

10 U.S.C. § 1089(a). Both § 1089(a) and § 233(a) address claims for "damage for personal injury, including death" which result from certain federal officials involved in the "performance of medical, dental, or related health functions." Both subsections incorporate by reference 28 U.S.C. §§ 1346 and 2672 of the FTCA, and explain that the remedy provided by those subsections "shall be exclusive of any other civil action or proceeding by reason of the same sub-

ject matter." The Supreme Court has acknowledged the FTCA's "express preservation of employee liability" for *Bivens* claims in the context of 10 U.S.C. § 1089. *Smith*, 499 U.S. at 166-67, 111 S.Ct. 1180. Like 10 U.S.C. § 1089, § 233(a) of the Public Health Service Act incorporates the FTCA as an exclusive remedy, and like 10 U.S.C. § 1089, § 233(a) incorporates that remedy's express preservation of employee liability for *Bivens* claims.

Defendants rely heavily upon the Second Circuit's opinion in *Cuoco v. Moritsugu*, 222 F.3d 99, 107 (2d Cir.2000), which held that the plain language of § 233(a) precluded *Bivens* actions. Although *Cuoco* cites § 233(a), and its incorporation of the FTCA remedy, it appears that the court, for whatever reason, was not aware of what the FTCA remedy in fact consisted. If the Second Circuit had followed the statutory trail back to 28 U.S.C. § 2679, this Court can only opine that *Cuoco* would have adhered to the statutory mandate preserving *Bivens* claims. This Court therefore respectfully requests that the Second Circuit, as well as the several other courts that have followed *Cuoco*, reconsider their holdings. *See, e.g., Anderson v. Bureau of Prisons*, 176 Fed.Appx. 242, 243 (3d Cir.2006) (unpublished); *Lyons v. United States*, No. 4:03CV1620, 2008 WL 141576, at *12 n. 5 (Jan. 11, 2008) (unpublished); *Lee v. Guavara*, C/A/ No. 9:06-1947, 2007 WL 2792183, at *14 (D.S.C. Sept. 24, 2007) (unpublished); *Fourstar v. Vidrine*, No. 1:06-cv-916, 2007 WL 2781894, at *4 (S.D.Ind. Sept. 21, 2007); *Hodge v. United States*, No. 3:06cv1622, 2007 WL 2571938, at *4-5 (M.D.Pa. Aug. 31, 2007) (unpublished); *Coley v. Sulayman*, Civ. Action No. 06-3762, 2007 WL 2306726, at *4-5 (D.N.J.

Aug. 7, 2007) (unpublished); *Wallace v. Dawson*, No. 9:05CV1086, 2007 WL 274757, at *4 (N.D.N.Y. Jan. 29, 2007) (unpublished); *Barbaro v. U.S.A.*, No. 05 Civ. 6998, 2006 WL 3161647, at *1 (S.D.N.Y. Oct. 30, 2006) (unpublished); *Williams v. Stepp*, No. 03-cv-0824, 2006 WL 2724917, at *3-4 (S.D.Ill. Sept. 21, 2006) (unpublished); *Cuco v. Fed. Medical Center-Lexington*, No. 05-CV-232, 2006 WL 1635668, at *20 (E.D.Ky. June 9, 2006) (unpublished); *Arrington v. Inch*, No. 1:05-CV-0245, 2006 WL 860961, at *5 (M.D.Pa. March 30, 2006) (unpublished); *Foreman v. Fed. Corr. Inst.*, No. CIV A 504-CV-01260, 2006 WL 4537211, at *8 (S.D.W.Va. March 29, 2006) (unpublished); *Pimentel v. Deboo*, 411 F.Supp.2d 118, 126-27 (D.Conn.2006); *Whooten v. Bussanich*, No. Civ. 4:CV-04-223, 2005 WL 2130016, at *3 (M.D.Pa. Sept. 2, 2005) (unpublished); *Freeman v. Inch*, No. 3:04-CV-1546, 2005 WL 1154407, at *2 (M.D.Pa. May 16, 2005) (unpublished); *Dawson v. Williams*, No. 04 Civ. 1834, 2005 WL 475587, at *8 (S.D.N.Y. Feb. 28, 2005) (unpublished); *Lovell v. Cayuga Corr. Facility*, No. 02-CV-6640L, 2004 WL 2202624, at *2 (W.D.N.Y. Sept. 29, 2004) (unpublished); *Valdivia v. Hannefed*, No. 02-CV-0424, 2004 WL 1811398, at *4 (W.D.N.Y. Aug. 10, 2004) (unpublished); *Cook v. Blair*, No. 5:02-CT-609, 2003 WL 23857310, at *1 (E.D.N.C. March 21, 2003) (unpublished); *Brown v. McElroy*, 160 F.Supp.2d 699, 703 (S.D.N.Y.2001).

The Supreme Court did not rely in *Carlson* on the express FTCA language preserving *Bivens* remedies because that language was added to the FTCA in 1988—eight years after *Carlson*—as part of the Federal Employees Liability Reform and Tort Compensation Act. In effect, the 1988 amendment codified

the holding in *Carlson* and made explicit the fact that Congress did not intend for the FTCA to preempt *Bivens* claims. Therefore, any ambiguity that may have existed prior to the 1988 amendment has long been extinguished. Frankly, the Court is surprised that neither the parties in this case, nor the Second Circuit in *Cuoco*, nor the many courts that have followed *Cuoco* without analysis, have noticed that the FTCA explicitly preserves the right to bring *Bivens* claims. Therefore, according to the plain text of § 233(a), Public Health Service officials are immune from suit under the circumstances provided by the FTCA, which does not include claims for constitutional violations; the PHS Defendants are therefore not entitled to immunity in this case.

2. Legislative History

The plain text ends the inquiry. The Court is compelled to follow the direct expression of intent in § 233(a). Period. *Cf. U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir.2001) ("If the statute is ambiguous, we consider the legislative history."). It is useful nevertheless to note that the legislative history in this case is equally direct. The relevant materials provide context for what Congress envisioned by preserving *Bivens* claims, and make clear that not only did Congress intend to preserve the *Bivens* remedy, but it intended to do so specifically in the context of § 233(a).

a. Congress Intended to Preserve *Bivens* Because of the Difference Between Claims for Malpractice and Claims for Constitutional Violations

A 1988 House Committee Report of the 1988 amendment to the FTCA stated the following:

> The second major feature of section 5 [codified at 28 U.S.C. § 2679(b)(2)(A)] is that the exclusive remedy expressly does not extend to so-called constitutional torts. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 [91 S.Ct. 1999, 29 L.Ed.2d 619] (1971). Courts have drawn a sharp distinction between common law torts and constitutional or *Bivens* torts. Common law torts are the routine acts or omissions which occur daily in the course of business and which have been redressed in an evolving manner by courts for, at least, the last 800 years. . . . As used in H.R. 4612, the term 'common law tort' embraces not only those state law causes of action predicated on the 'common' or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence. A good example of such codification or tort causes of action are state wrongful death actions which are predominantly found upon state wrongful death statutes. It is well established that the FTCA applies to such codified torts. See, e.g., *Richards v. United States*, 369 U.S. 1, 6-7 [82 S.Ct. 585, 7 L.Ed.2d 492] (1962); *Proud v. United States*, 723 F.2d 705,

> 706-07 (9th Cir.1984), cert. denied, 467 U.S. 1252 [104 S.Ct. 3536, 82 L.Ed.2d 841] (1984) applicability of recreational use statute). A constitutional tort action, on the other hand, is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution. Since the Supreme Court's decision in *Bivens, supra*, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, H.R. 4612 *would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.*

H.R. Rep. 100-700 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5950 (emphasis added). Thus, Congress could not have been clearer that 28 U.S.C. § 2679, which is incorporated by reference into § 233(a), was intended to *preserve*, not preclude, *Bivens* actions to redress constitutional violations. This congressional statement is particularly persuasive because, as legislative history goes, committee reports are given great weight. *See Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 687 (9th Cir.2006).

It is not surprising that Congress, in preserving *Bivens* liability, emphasized the difference between constitutional torts and garden-variety malpractice claims, for the distinction is longstanding and important. To establish an Eighth Amendment violation for inadequate medical care a plaintiff must show "deliberate indifference to [his] serious medical

needs." *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Such deliberate indifference may "manifest[ ]" itself through the intentional denial or delay of care or an intentional interference "with the treatment once prescribed." *Id.* at 104-05, 97 S.Ct. 285. However, neither an accident, an "inadvertent failure to provide adequate medical care," nor "negligen[ce] in diagnosing or treating a medical condition," though each may be medical malpractice, is cognizable as a federal constitutional claim. *Id.* at 105-06, 97 S.Ct. 285. In short, a constitutional violation is an intentional tort—a higher standard than a negligence suit for medical malpractice based on a personal injury.

Even the legislative history from § 233(a) itself—expressed eighteen years before Congress would amend the FTCA to explicitly preserve *Bivens* claims—reveals that Congress intended by § 233(a) to immunize PHS employees from garden-variety malpractice claims, not from constitutional violations.[12]

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[12] To the extent that § 233(a) is at all ambiguous (which it is not) as to whether it immunizes PHS employees from constitutional as well as malpractice claims, the title of the statutory subsection supports the Court's conclusion. *See Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947) (noting that "the title of a statute and the heading of a section" may be used "[f]or interpretive purposes . . . when they shed light on some ambiguous word or phrase"). In this case, the title of the relevant section, "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS," clearly indicates that Congress, even before it amended the FTCA expressly to preserve *Bivens* claims, intended § 233(a) to apply to malpractice and negligence actions specifically. Far from suggesting that the subsection covers

The provision in question was not a part of the original Public Health Service Act; rather, it was introduced as an amendment in the House during a congressional debate on December 18, 1970. Representative Staggers, who introduced the amendment, stated that the House "ought to" adopt the amendment so that, "in the event there is a suit against a PHS doctor *alleging malpractice*, the Attorney Gen-

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constitutional claims, then, the title shows that Congress meant by this section to offer immunity for certain specific claims, and that those claims did not include intentional (constitutional) torts.

When the statute was codified in the United States Code at 42 U.S.C. § 233(a), the title of the subsection was changed—without any congressional amendment—from "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS" to "Exclusiveness of Remedy." *Compare* Emergency Health Personnel Act of 1970, Pub.L. No. 91-623, § 223(a), 84 Stat. 1868, 1870 (1970) *with* 42 U.S.C. § 233(a)(1970). To the extent that the sub-section is ambiguous, its title affects its meaning. In the context of "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS," the grant of immunity obviously refers to malpractice and negligence actions; by contrast, in the context of "Exclusiveness of Remedy," the text could apply in a much broader fashion.

Nevertheless, there is no doubt about which version the Court must follow. "Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law, . . . it is the Statutes at Large that provides the 'legal evidence of laws.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 449, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). As "the Code cannot prevail over the Statutes at Large when the two are inconsistent," *United States v. Welden*, 377 U.S. 95, 98 n.4, 84 S.Ct. 1082, 12 L.Ed.2d 152 (1964), the Court will consider only the original version entitled "DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE ACTS," and with it that title's effect on the scope of the provision.

eral of the United States would defend them in whatever suit may arise." 91 Cong. Rec. H42542-32 (daily ed. Dec. 18, 1970) (emphasis added). Representative Staggers emphasized that the amendment was "needed because of the low salaries that [PHS doctors] receive and in view of their low salaries, they cannot afford to take out the insurance to cover them in the *ordinary course of their practice of medicine*." *Id.* (emphasis added). Representative Hall supported the amendment but urged the committee to "look[ ] into the general problem in the United States of malpractice insurance." *Id.* The House approved the amendment. In context, then, the amendment obviously stemmed from concerns over liability for unintentional malpractice, *not* from attempts to avoid responsibility for the kind of intentional torts that would support a constitutional violation.

The only mention of the amendment in the Senate occurred three days later, when Senator Javitz expressed his support for "the provision for the defense of certain malpractice and negligence suits" which would protect doctors "in the event there is a suit against a PHS doctor alleging malpractice." 91 Cong. Rec. S42977 (daily ed. Dec. 21, 1970). Aside from these instances, the amendment, as far as the Court can tell, was never mentioned. Thus, even before the 1988 FTCA amendment, far from revealing an intent to immunize PHS doctors from intentional torts, the legislative history of § 233(a) shows that

the amendment was clearly intended to protect PHS doctors from ordinary medical malpractice actions.[13]

b. Congress Intended to Preserve *Bivens* in the Specific Context of § 233(a)

The legislative history of the 1988 amendment to the FTCA reveals not only that Congress intended to preserve *Bivens* claims, but that it so intended specifically with respect to § 233(a). Some statutory context is in order.

This 1988 FTCA amendment—28 U.S.C. § 2679—renders the FTCA the exclusive remedy for all civil actions (except, *inter alia*, *Bivens* claims) against all federal employees. The legislative history to 28 U.S.C. § 2679 explains that the intention of the provision was to "remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and would instead provide that the exclusive remedy for such torts is through an action against the United States under the Federal Tort Claims Act." H.R. Rep. 100-700, 1988 U.S.C.C.A.N., at 5947. In the same House Report in which it articulated its reasons for preserving *Bivens* actions, Congress explained that it felt comfortable awarding such a broad swath of immunity because

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[13] Such a distinction makes sense. Protecting low-paid Public Health Service doctors from astronomical malpractice insurance premiums due to run-of-the-mill personal injury claims is a reasonable, practical endeavor. Protecting individuals who intentionally inflict cruel and unusual punishment just because they happen to work for the Public Health Service is not. Would an individual who purposefully subjected a patient to surgery without anesthesia deserve immunity? A civilized society can answer this question only in the negative.

> "[t]here is substantial precedent for providing an exclusive remedy against the United States for actions of Federal employees. Such an exclusive remedy has already been enacted to cover the activities of certain Federal employees, including: . . . 42 U.S.C. 233 regarding Public Health Service Physicians."

Id. at 5948. In other words, 28 U.S.C. § 2679 provided the same immunity as § 233(a), but extended that immunity to all federal employees. After the 1988 passage of 28 U.S.C. § 2679, all federal employees—not just certain specified federal employees such as PHS officials—are covered. *See Smith*, 499 U.S. at 172-73, 111 S.Ct. 1180 (holding that the Federal Employees Liability Reform and Tort Compensation Act, including § 2679, applies both to "employees who are covered under pre-Act immunity statutes [such as § 233(a)] and those who are not," and noting that this immunity is limited by the "preserv[ation] of employee liability for *Bivens* actions").

Congress was aware of § 233(a) when it expanded immunity to all federal employees. Indeed, provisions like § 233(a) provided the example and incentive to so broaden that immunity. At the same time, Congress made clear that this immunity was intended to cover "routine" torts, and that a plaintiff whose constitutional rights had been violated remained free to pursue a *Bivens* claim against the individual federal employee in question. H.R. Rep. 100-700, 1988 U.S.C.C.A.N., at 5947. In light of the explicit statutory text and legislative history, there can be no doubt that the FTCA—and § 233(a), which incorporates the FTCA's remedies by reference—

expressly allows for the *Bivens* claim that Mr. Castaneda seeks to bring in this case.

C. Plaintiff's Allegations and Evidence, if True, Prove Constitutional Violations

Ultimately, Defendants concede that an Eighth Amendment claim for unconstitutionally-inadequate medical care is not subsumed by a claim for medical malpractice; instead, they urge that Plaintiff's claims just don't make the constitutional cut, so to speak. As Defendants put it, "[t]he bottom line is that Plaintiff's claims form the basis for a medical malpractice action (a non-constitutional tort claim) against the United States, and not a *Bivens* claim against each Public Health Service Defendant." (Mot. 8.) Defendants acknowledge that Plaintiff's complaint alleges that the Public Health Service Defendants "'purposefully denied him basic and humane medical care for illegal and improper reasons,'" but posit that "[t]his vague and conclusory allegation fails to state any civil rights violation." (*Id.* 6. (quoting Compl.).) The Court rejects Defendants' attempt to sidestep responsibility for what appears to be, if the evidence holds up, one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered.

There simply can be no dispute that Plaintiff has stated a cognizable claim for an Eighth Amendment violation. Mr. Castaneda quite obviously suffered from a serious medical condition—terminal penile cancer. The only question is whether his allegations, if true, show that Defendants were deliberately indifferent to his condition. The Court finds that they do.

Indeed, the Court finds perplexing the fact that Defendants would try to argue that Plaintiff's allegations are conclusory, given that Plaintiff has submitted thirty-three exhibits of Defendants' own official medical records documenting their knowledge of the fact that several physicians had concluded that Plaintiff's lesion was very likely penile cancer, and that he needed a biopsy—a straightforward procedure—to rule cancer out. These documents show that nevertheless, Defendants refused to grant Plaintiff this simple procedure for almost eleven months, even while they noted that his pain and suffering were severe and increasing, that his penis was emitting blood and discharge, and that a second growth had developed.

Therefore, if Plaintiff's evidence proves true, from the first time Castaneda presented with a suspicious lesion in March 2006 through his release in February 2007, the care afforded him by Defendants can be characterized by one word: nothing. The evidence that Plaintiff has already produced at this early stage in the litigation is more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions. Defendants will surely have an opportunity to contest or refute the evidence presented. But their assertion that Plaintiff's claim is not even cognizable is, frankly, frivolous.

D. FTCA Remedy is Not Equally Effective as a *Bivens* Action

The circumstances of this case illustrate why, as the Supreme Court concluded in *Carlson*, FTCA claims against the United States are not as effective

a remedy as a *Bivens* claim against individual federal officials. First, and most importantly, as Defendants acknowledge, Plaintiff Castaneda may not bring his constitutional claims for inadequate medical care against the United States under the FTCA because the United States has not waived sovereign immunity to be sued for constitutional torts. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 478-480, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). It would turn logic on its head to hold that the FTCA is an "equally effective" remedy for constitutional violations as a *Bivens* action, *Carlson*, 446 U.S. at 19, 100 S.Ct. 1468, when suits under the FTCA do not even *allow* for constitutional claims. *See Vaccaro v. Dobre*, 81 F.3d 854, 857 (9th Cir.1996) (holding that prisoner plaintiff did not have to serve the United States as a defendant in his *Bivens* claim for inadequate medical care "[b]ecause [plaintiff] did not and could not have sued the United States or its officers in their official capacity upon a *Bivens* claim").[14]

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[14] Defendants rely primarily on the Second Circuit's decision in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir.2000), for the proposition that § 233(a) was intended by Congress to preclude *Bivens* actions. For several reasons, the Court does not find this non-binding authority persuasive. First, and most importantly, the court in *Cuoco* did not recognize that § 233(a) explicitly incorporates by reference the FTCA remedy codified at 28 U.S.C. § 2679, which, as discussed, expressly preserves the right to bring *Bivens* claims. Second, and relatedly, *Cuoco* does not address whether Congress viewed the FTCA as being equally effective as a *Bivens* action. The Supreme Court has held that this threshold issue must be established before declaring the FTCA an exclusive remedy at the expense of a *Bivens* claim. *See Carlson*, 446 U.S. at 18-19, 100 S.Ct. 1468. Yet, *Cuoco* never makes this finding, nor does the opinion analyze the four factors set forth in *Carlson* that explain why

Indeed, Defendants' contorted reasoning is revealed by its request for relief in this motion: Defendants ask this Court to hold that Congress, through § 233(a), intended the FTCA to be the exclusive cause of action for Castaneda's constitutional claims, and then, having thus converted the claim to an FTCA action against the United States, Defendants seek dismissal on the grounds that the United States may not be sued for constitutional torts under the FTCA. The Court will not indulge this backwards argument.

Second, an FTCA action is only allowed to the extent it would be allowed under state law. 28 U.S.C. § 1346(b). California caps non-economic damages in medical malpractice actions at $250,000. *See* Cal. Civ. Code § 3333.2. In contrast, there is no cap on damages in *Bivens* actions. Plaintiff has a strong argument that $250,000 would be inadequate to compensate his "ten months of pain, bleeding, anxiety,

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remedies under the FTCA and *Bivens* are not equally effective. 222 F.3d at 107-09. Third, *Cuoco* does not adequately examine the differences between a state law medical negligence claim under the FTCA and a constitutional claim under *Bivens*. On the one hand, *Cuoco* states: "Of course Congress could not, by the simple expedient of enacting a statute, deprive Cuoco of her constitutional due process rights, but that is not what § 233(a) does." *Id.* at 108. In the next sentence, however, *Cuoco* asserts that § 233(a) "protects commissioned officers or employees of the Public Health Service from being subject to suit while performing medical and similar functions by requiring that such lawsuits be brought against the United States instead." *Id.* This analysis overlooks the important fact that, as discussed, the United States cannot be sued for constitutional violations. Therefore, *Cuoco*'s construction of § 233(a) does exactly what it claims it cannot do: deprive a plaintiff of a constitutional claim by relegating him to an action under the FTCA.

loss of sleep, and humiliation while in ICE's custody, the amputation of his penis, and nearly a year of grueling chemotherapy," not to mention his eventual death. (Opp'n 19.)

Third, FTCA actions, unlike *Bivens* claims, preclude punitive damages. Yet the evidence that Plaintiff has presented thus far—through Defendants' own records—suggests a strong case for punitive damages because it shows that Defendants' behavior was both callous and misleading. The evidence suggests that they refused Castaneda's request for a biopsy despite their knowledge that several medical specialists suspected cancer and "strongly recommended" a biopsy to rule out that possibility. (Doyle Decl. Ex. 11.) Worse, the evidence suggests that not only did the individual Public Health Service Defendants ignore doctor recommendations to provide Castaneda with a simple procedure, they may also have lied about those recommendations.

For example, Defendant Esther Hui, M.D. stated in an official report that Dr. Wilkinson considered a biopsy or circumcision for Mr. Castaneda to be "elective." (*Id.* Ex. 5) ("Dr. Wilkinson called" and recommended a biopsy, which is "an elective outpatient procedure"). Similarly, another official DIHS report, written by Anthony Walker, claimed that "Dr. Masters stated that elective procedures this patient may need in the future are cytoscopy and circumcision." (*Id.* Ex. 20.) Yet the reports of Dr. Masters and Dr. Wilkinson never mention the word "elective." On the contrary, Dr. Wilkinson worried that the lesion "may represent . . . a penile cancer" and "require[d] urgent urologic assessment of biopsy" because "even benign lesions" in that area can be deadly. (*Id.* Ex. 4.) Dr.

Masters stated the need to "rule out malignant neoplasm" and that "appropriate treatment would be circumcision [and] . . . a biopsy." (*Id.* Ex. 19.)

Further, Dr. Hui and the DIHS included this false characterization in official reports despite the fact that a TAR recognized that both doctors "strongly recommend admission, urology consultation, surgical intervention via biopsy," and despite that fact that Dr. Wilkinson reported that he had spoken to "the physicians at the correctional facility" and "[t]hey understand the need for urgent diagnosis and treatment." (*Id.* Ex. 11, 4.) Indeed, Dr. Hui herself recognized in a report that Castaneda might have cancer but "[s]ince this is an elective outpatient procedure, we decided that we would not admit him [to the hospital to have the procedure] at this time." (*Id.* Ex. 5.)

Plaintiff's evidence also suggests why Dr. Hui was so interested in characterizing the surgery as elective; "as such the Federal Government will not provide for such surgery."[15] (*Id.* Ex. 17.) Plaintiff has

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[15] The Court has serious questions as to the constitutionality of a policy of refusing to pay for all medical treatment that can be characterized as "elective" because, as evidenced by this case, the label fails to identify accurately who needs care. *See, e.g., Brock v. Wright*, 315 F.3d 158, 164 n.3 (2d Cir.2003) ("Merely because a condition might be characterized as 'cosmetic' does not mean that its seriousness should not be analyzed using the kind of factors" employed in normal Eighth Amendment jurisprudence). DIHS labeled the treatment in this case "elective" even while acknowledging that Castaneda's condition was so "severe" that he would need a "resection" –full or partial removal of the penis. (Doyle Decl. Ex. 14.) Indeed, Plaintiff's evidence suggests that Dr. Hui defined "elective" so broadly that she believes the term to encompass life-saving treatment.

thus submitted compelling evidence that Defendants purposefully mischaracterized Plaintiff's medical conditions as elective in order to refuse him care. Dr. Wilkinson reported that Defendants refused to admit Castaneda to the hospital for a biopsy because they wanted a "more cost effective" treatment. (*Id.* Ex. 4.) Official records document Defendants' circular logic that because they would not allow him to have the biopsy, "he DOES NOT have cancer at this time"; because he does not have cancer, he therefore does not need a biopsy. (*Id.* Ex. 8.) In other words, as long as they could label Castaneda's condition elective, Defendants could remain willfully blind about his lesion and avoid having to pay for its treatment. If Plaintiff's evidence holds up, the conduct that he has established on the part of Defendants is beyond cruel and unusual.[16]

IV. CONCLUSION

Based on the foregoing analysis, motion to dismiss is DENIED.

IT IS SO ORDERED.

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[16] After all, Plaintiff has submitted powerful evidence that Defendants knew Castaneda needed a biopsy to rule out cancer, falsely stated that his doctors called the biopsy "elective", and let him suffer in extreme pain for almost one year while telling him to be "patient" and treating him with Ibuprofen, antihistamines, and extra pairs of boxer shorts. Everyone knows cancer is often deadly. Everyone knows that early diagnosis and treatment often saves lives. Everyone knows that if you deny someone the opportunity for an early diagnosis and treatment, you may be—literally—killing the person. Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker "cruel" is inadequate.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 08–55684

D.C. NO. 2:07-CV-07241-DDP-JC
Central District of California, Los Angeles

YANIRA CASTANEDA, as personal representative of Estate of Francisco Castaneda; et al., Plaintiffs-Appellees,

v.

UNITED STATES; et al., Defendants,

and

CHRIS HENNEFORD, et al.; Defendants-Appellants.

ORDER

[Stamp indicating order filed January 29, 2009, Molly C. Dwyer, Clerk, U.S. Court of Appeals]

[Stamp indicating order received January 29, 2009, Clerk, U.S. District Court, Central District of California]

Before: Reinhardt, Berzon, M. Smith, Circuit Judges:

The panel has unanimously voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. FED. R. APP. P. 35.

The petition for rehearing en banc is DENIED.

OPPOSITION BRIEF

(3) (4)
Supreme Court, U.S.
FILED
AUG 12 2009
OFFICE OF THE CLERK

Nos. 08-1529 and 08-1547

In The
Supreme Court of the United States

EUGENE MIGLIACCIO, ET AL.,

Petitioners,

v.

YANIRA CASTANEDA, ET AL.,

Respondents.

CHRIS HENNEFORD,

Petitioner,

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a)—enacted in 1970 to provide Public Health Service (PHS) medical personnel with immunity from malpractice and negligence actions by making the Federal Tort Claims Act (FTCA) the exclusive remedy for such actions—bar a suit alleging constitutional violations under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which the FTCA expressly permits against "any employee of the Government" under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. §§ 2671-2680?

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STATUTES INVOLVED

The statutes governing the analysis of the question presented provide as follows:

28 U.S.C. § 2679(b):

> (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –
>
> (A) which is bought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 223(a), 84 Stat. 1868, 1870 (1970), *codified at* 42 U.S.C. § 233(a):[1]

> DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE SUITS
>
> The remedy against the United States provided by sections 1346(b) and 2672 of title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

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[1] This statute was originally numbered "§ 223(a)" in Public Law No. 91-623, but the drafters of the U.S. Code renumbered this section as "§ 233(a)" when it was first published in 1970. *See* 42 U.S.C. § 233(a) (1970). For consistency, this Brief will refer to the statute as "§ 233(a)."

STATEMENT

I. FACTUAL BACKGROUND

Francisco Castaneda was an immigration detainee who had his penis amputated and developed terminal penile cancer because Petitioners and other defendants ignored outside physicians' recommendations and refused to provide him a biopsy during his nearly eleven-month detention by Immigration and Customs Enforcement (ICE).

Castaneda entered the San Diego Correctional Facility (SDCF) under ICE custody on March 27, 2006, and immediately informed SDCF medical personnel that a lesion on his penis was painful, growing, bleeding, and exuding discharge. Pet. App. 3a.[2] The next day, Castaneda met with physician's assistant Lieutenant Anthony Walker, who recommended a urology consult and biopsy "ASAP," noting Castaneda's history of genital warts and his family history of cancer. *Id.* at 3a-4a.

Petitioner Esther Hui was Castaneda's treating physician during his eight-month detention at SDCF. 9th Circuit Supplemental Excerpts of Record (SER) 358, 366-67. Hui recalls seeing Castaneda once, but did not document her examination, has no idea when it occurred, and does not recall if she ever reviewed Castaneda's medical records. *Id.* at 361, 363.

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[2] All citations to "Pet. App." are to the Appendix filed in No. 08-1529.

Castaneda was not provided an outside consult until June 7, 2006, more than two months after he entered ICE custody. On that date, he met with oncologist John Wilkinson, M.D., who agreed that Castaneda's symptoms required urgent diagnosis and treatment, including a biopsy. SER 10-14, 232. Wilkinson offered to admit Castaneda to the hospital and assist in coordinating the biopsy. Pet. App. 4a. Hui determined that the biopsy was an "elective" outpatient procedure and rejected it (*id.*), even though she admitted that a biopsy was medically necessary and the only definitive way to rule out cancer (SER 360-61, 369).

Over the next several months, Castaneda's symptoms worsened, but he did not receive the biopsy. On June 12, he filed a grievance report stating that he was "in a considerable amount of pain and . . . was in desperate need of medical attention." Pet. App. 5. On July 13, a Treatment Authorization Request (TAR) sought emergency room evaluation and treatment for Castaneda, noting that Wilkinson "strongly recommended" a biopsy. *Id.* at 45a-46a. ICE brought Castaneda to the Scripps Mercy Chula Vista emergency room. Urologist Daniel Hunting, M.D., a defendant in this case, briefly examined Castaneda, concluded that the lesion was genital warts, and did not perform the recommended biopsy. *Id.* at 5a-6a.

On August 22, Castaneda was examined by urologist Robert Masters, M.D., who concluded that Castaneda needed a circumcision, which would relieve the "ongoing medical side effects of the lesion"

and provide a biopsy for analysis. *Id.* at 6a. On August 30, Castaneda received a memo from Petitioner Stephen Gonsalves, SDCF's Health Services Administrator, stating that the "surgical intervention" recommended by Masters was "elective in nature," and that the care Castaneda had received was "appropriate and in accordance with our policies." *Id.* at 49a.

On September 26, another lesion had formed on Castaneda's penis and "a foul odor was emitting from the uncircumcised area with a mushroomed wart." *Id.* at 6a. Division of Immigration Health Services (DIHS) records on November 14 reflect that Castaneda's "symptoms have worsened," and that Castaneda "feels a constant pinching pain," "has blood and discharge on his shorts," and "complains of a swollen rectum." *Id.* DIHS responded by prescribing Castaneda laxatives and increasing his weekly allotment of boxer shorts. *Id.*

On November 17, Castaneda was transferred to ICE's San Pedro Service Processing Center, but his transfer form listed no current medical problems. *Id.* at 7a. In early December, ACLU attorneys began advocating to get Castaneda the biopsy he had been prescribed nearly a year earlier. *Id.* Urologist Lawrence Greenberg, M.D., saw Castaneda on December 14, describing Castaneda's penis as "a mess" and stating that he required surgery. *Id.* For two months, the ACLU unsuccessfully attempted to secure Castaneda the treatment he required. *Id.* On January 25, 2007, Castaneda was seen by Asghar

Askari, M.D., who also ordered a biopsy after determining that Castaneda "most likely [had] penile cancer." *Id.*

On February 5, instead of providing the biopsy, ICE released Castaneda. *Id.* Castaneda went to the emergency room of Harbor-UCLA Hospital in Los Angeles on February 8, where he was diagnosed with squamous cell carcinoma of the penis. His penis was amputated on February 14. *Id.* The amputation did not occur in time to save Castaneda's life, as the cancer had metastasized and did not respond to numerous rounds of chemotherapy. *Id.* Castaneda died on February 16, 2008. *Id.* at 8a. He was thirty-six. *Id.*

II. PROCEDURAL BACKGROUND

Castaneda's sister and representative of his estate, Yanira Castaneda, and his sole heir, Vanessa Castaneda (collectively, "Respondents"), filed this wrongful death and survival action against the United States and a number of state and federal officials, including Petitioners, who are all PHS personnel. Respondents allege that Petitioners violated Castaneda's constitutional right to adequate medical care under the Fifth and Eighth Amendments by failing to treat his known serious medical condition, acting with deliberate indifference to his serious health needs, and establishing an unconstitutional policy and/or custom for providing medical care to detainees. Respondents also allege

that Petitioners violated Castaneda's constitutional right to equal protection under the Fifth Amendment by failing to treat his known serious medical condition because of his immigration status, and establishing an unconstitutional policy and/or custom for providing medical care to detainees.

The government moved to dismiss the claims against Petitioners, arguing that 42 U.S.C. § 233(a) provides Petitioners with absolute immunity from claims under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The district court denied the motion, holding that § 233(a)'s plain language dictates that Respondents may assert *Bivens* claims against PHS medical personnel. Pet. App. 54a. The court concluded that § 233(a), through its reference to FTCA provisions, "incorporates the provision of the FTCA [28 U.S.C. § 2679(b)(2)(A)] which *explicitly* preserves a plaintiff's right to bring a *Bivens* action." Pet. App. 59a-61a (emphasis in original).

The district court further stated that the conduct Respondents allege "is beyond cruel and unusual" (Pet. App. 80a), and constitutes "one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered" (*id.* at 74a). The court noted, "Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate." *Id.* at 80a n.16.

Petitioners filed an interlocutory appeal. Shortly thereafter, the government admitted liability and

causation on Respondents' FTCA claim against the United States for medical negligence. Gov't Notice of Admis., No. 07-7241 (C.D. Cal. Apr. 24, 2008).[3]

The court of appeals affirmed. Pet. App. 1a-40a. The court turned to *Carlson v. Green*, 446 U.S. 14 (1980), as "the starting point" for its analysis of whether § 233(a) precludes *Bivens* relief. Pet. App. 10a. The court stated that *Carlson*'s two-factor test for *Bivens* preemption, which places the burden on the party asserting preemption to demonstrate the existence of an "alternative remedy" to a *Bivens* remedy that is "both (a) 'explicitly declared to be a substitute' and (b) is 'viewed as equally effective,'" would guide its analysis. *Id.* (quoting *Carlson*, 446 U.S. at 18-19).

Noting *Carlson*'s conclusion that Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief, the court found "no basis" for distinguishing *Carlson* here. Pet. App. 13a-14a. The court also concluded that § 233(a) does not

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[3] Despite an order directing the government to produce all responsive documents during discovery, the government failed to produce documents revealing a cover-up of Castaneda's complaints about his medical care. *The Washington Post* uncovered an e-mail exchange where physician's assistant David Lusche asked Walker to "patch up" a grievance that Castaneda had submitted, but Walker refused to do so. SER 413-15, 419. Nevertheless, someone altered the grievance to state that it had been "Resolved," even though the grievance was still pending. *Id.* at 425, 437. The government did not produce these e-mails until after the *Post* story broke. *Id.* at 432-35.

contain any "explicit declaration" that Congress intended to provide PHS personnel immunity from *Bivens* actions. *Id.* at 19a. The court found support for this conclusion in § 233(a)'s text (*id.*); the text of the FTCA's remedy provisions, as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (LRTCA), Pub. L. No. 100-694, 102 Stat. 4563 (*id.* at 25a); the historical context in which § 233(a) was enacted (*id.* at 20a-23a); and the legislative histories of § 233(a) and the LRTCA (*id.* at 22a, 26a-28a).

Finally, the court below concluded, in accordance with *Carlson*, that there are no "special factors" precluding a *Bivens* action. *Id.* at 37a-39a (quoting *Carlson*, 446 U.S. at 18).

REASONS FOR DENYING THE WRIT

To create the appearance of an issue worthy of this Court's review, Petitioners reduce the court of appeals' analysis of the immunity conferred by § 233(a) to one proposition. They argue that the court erred by requiring a showing of "magic words" from Congress demonstrating that § 233(a) precludes *Bivens* actions against PHS personnel. Migliaccio Pet. 10; *see also* Henneford Pet. 22. According to Petitioners, the court of appeals created a conflict among the courts because its demand for these "magic words" led it to misinterpret *Carlson*. By

casting the decision below in this light, Petitioners obscure the fact that it is the first—and only—decision to have examined the texts of both § 233(a) and the LRTCA, the historical contexts and legislative histories of these interrelated statutes, and this Court's immunity analyses in both *Carlson* and *United States v. Smith*, 499 U.S. 160 (1991), which all demonstrate that Congress did not intend § 233(a) to preclude *Bivens* actions.

Review is not warranted here for several reasons. First, the decision below is consistent with this Court's jurisprudence. Applying *Carlson*, the court of appeals correctly concluded that the texts, historical contexts, and legislative histories of § 233(a) and the LRTCA demonstrate that Congress did not "explicitly declare" that the FTCA is an "equally effective" substitute for *Bivens* actions against PHS personnel. 446 U.S. at 18-19. Second, there is no meaningful conflict among the courts warranting review because the "split" identified by Petitioners is both shallow and unreasoned. Only the Ninth and Second Circuits have issued binding decisions on the scope of § 233(a)'s immunity and, in any event, the court below is the only appellate court to thoroughly analyze both § 233(a) and the LRTCA to determine Congress's intent. Finally, review is not warranted because Petitioners and their *amici* overstate the impact of the decision below. Contrary to their claims, the practical and legal realities of the circumstances under which federal employees provide medical

services demonstrate that the decision below will not significantly affect the government's ability to recruit and retain PHS personnel. For all of these reasons, the petitions for a writ of certiorari should be denied.

I. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

Petitioners and their *amici* argue that review is warranted on the ground that the decision below conflicts with *Carlson*. However, there is no conflict. The court faithfully applied *Carlson*'s two-part test for *Bivens* preclusion and correctly concluded that Congress did not intend to bar *Bivens* actions against PHS medical personnel. The decision below also comports with *Smith*, which Petitioners and their *amici* ignore. In *Smith*, this Court concluded that the LRTCA—which expressly exempts *Bivens* actions from the FTCA's exclusivity—applies to *all* federal employees, including those subject to pre-LRTCA immunity statutes like § 233(a). 499 U.S. at 172-173. Accordingly, both *Carlson* and *Smith* demonstrate the absence of any conflict between the decision below and prior rulings of this Court.

A. The Decision Below Is Consistent With *Carlson*.

Carlson supports the court of appeals' holding that § 233(a) does not preclude *Bivens* claims. The plaintiff there brought a *Bivens* action on behalf of her son's estate against Bureau of Prisons (BOP) officials alleging that her son died as a result of the officials' deliberate indifference to his serious medical needs while in federal custody, in violation of the Fifth and Eighth Amendments. 446 U.S. at 16-17. The officials argued that the remedy provided by the FTCA preempts any *Bivens* remedy. *Carlson* rejected that argument, holding that it is "crystal clear" in cases involving constitutional violations based on the failure to provide adequate medical care that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 20. *Carlson* concluded that "victims of constitutional violations by a federal agent have a right to recover damages against the official in federal court" unless the federal defendant: (1) "show[s] that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective"; or (2) shows "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 18-19 (citations omitted) (emphasis in original).

As explained below, the court of appeals applied this test and concluded that Congress neither: (1) explicitly declared that the remedy provided by the FTCA would be a substitute for recovery under

Bivens for constitutional violations committed by PHS personnel; nor (2) viewed the FTCA remedy to be equally effective as the *Bivens* remedy to redress constitutional violations. Pet. App. 10a. As further explained below, the court also concluded that there are no "special factors" precluding *Bivens* relief because this case is functionally identical to *Carlson*, which held that the FTCA's remedial scheme is not a "special factor" precluding *Bivens* actions. *Id.* at 38a.

1. Congress has explicitly declared its intent to preserve—not bar—*Bivens* actions against PHS personnel.

Petitioners argue that the court "misapplied" the "explicit declaration" prong of *Carlson*'s two-part test by requiring them to identify "magic words" from Congress demonstrating that § 233(a) precludes *Bivens* actions. Migliaccio Pet. 10; *see also* Henneford Pet. 22. The court of appeals did no such thing. In accordance with *Carlson*, the court analyzed the plain language of § 233(a) and the LRTCA, the historical context in which Congress enacted § 233(a), and the legislative histories of both statutes in concluding that Congress did not intend § 233(a) to preclude *Bivens* actions.

a. Plain language

The court of appeals examined the text of both § 233(a) and § 5 of the LRTCA, codified at 28 U.S.C. § 2679(b), to conclude that Congress never "explicitly

declare[d]" an intent to have the FTCA substitute for *Bivens* actions against PHS personnel. Pet. App. 35a.

Regarding § 233(a), the court below is the only court to consider that the statute is entitled "Defense of Certain Malpractice and Negligence Suits."[4] The court concluded that this title indicates Congress's "exclusive concern" with extending immunity to common-law malpractice and negligence actions—not actions alleging constitutional violations. Pet. App. 22a-23a (citation omitted). The court also rejected the government's argument that Congress's use of the term "malpractice" includes constitutional violations. Pet. App. 23a n.12.[5]

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[4] The court analyzed § 233(a)'s heading as it appears in the Statutes at Large—not in the U.S. Code—because the two versions of the statute are different. *Compare* Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 223(a) ("Defense of Certain Malpractice and Negligence Suits"), *with* 42 U.S.C. § 233(a) (1970), 42 U.S.C. § 233(a) (2003) ("Exclusiveness of remedy"). Where the language of a statute does not appear in the U.S. Code as it was printed in the Statutes at Large, courts defer to the Statutes at Large. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

[5] The government's argument that the term "malpractice" includes constitutional violations (U.S. Br. 15) conflicts with this Court's jurisprudence. *See, e.g., Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 477 (1994) (distinguishing constitutional torts from common-law torts; holding that "because [the plaintiff's] constitutional tort claim is not cognizable under § 1346(b), the FTCA does not constitute his 'exclusive' remedy"); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (stressing the difference between malpractice and an Eighth Amendment violation by holding that "a prisoner must allege acts or

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The court below found further support for its reading of § 233(a) in the LRTCA's plain language. *Id.* at 25a. The LRTCA, a 1988 amendment to the FTCA, provides that FTCA exclusivity "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The court reasoned that, by amending the FTCA in this way, "Congress made explicit" what had been implicit at the time Congress enacted § 233(a): that constitutional claims are outside the FTCA's purview. Pet. App. 25a.

The district court concluded that § 233(a) incorporates by reference the LRTCA's express preservation of *Bivens* remedies. *Id.* at 61a. It reasoned that § 233(a) must be read in conjunction with the FTCA provisions to which the statute expressly refers. Section 233(a) provides that, where PHS medical personnel cause certain types of damage, the remedy "against the United States *provided by sections 1346(b) and 2672 of title 28*" shall be the exclusive remedy. 42 U.S.C. § 233(a) (emphasis added). By incorporating "sections 1346(b) and 2672 of title 28"—which refer generally to the FTCA

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omissions sufficiently harmful to evidence deliberate indifference to serious medical needs" to state a claim for relief under the Constitution, which is significantly more difficult to prove than malpractice or negligence).

remedy[6]—into § 233(a)'s text, Congress ensured that § 233(a) makes the FTCA the exclusive remedy only to the extent that the FTCA provides. The FTCA, as amended by the LRTCA, explicitly preserves *Bivens* actions against all federal employees. *See* 28 U.S.C. § 1346(b) (noting that the remedy provided by the FTCA is "[s]ubject to the provisions of chapter 171" of title 28, in which the LRTCA is codified).

This reading of § 233(a) is further supported by the well-established principle that, "[w]hen a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption." 2B Norman J.

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[6] Indeed, as the government concedes, the FTCA remedy is commonly referred to as "sections 1346(b) and 2672"—not by reference to all the other sections governing the FTCA remedy, including §§ 2671 and 2673-2680. Respondents' App. 31a (Department of Justice attorney Jeffrey Clair states, "we do agree with the Plaintiffs . . . that references to § 1346(b) and § 2672 of Title . . . 28 are a typical statutory shorthand for referring . . . to the Federal Tort Claims Act."). The FTCA itself refers to the "remedy against the United States" as "provided by sections 1346(b) and 2672 of this title . . . ," 28 U.S.C. § 2679(b)(1), and every statute enacted to provide medical personnel immunity from common law torts, including 10 U.S.C. § 1089(a) (armed forces), 22 U.S.C. § 2702 (State Department), and 38 U.S.C. § 4116 (Veterans' Administration), refer *only* to "sections 1346(b) and 2672 of title 28" when describing the scope of the FTCA's exclusive remedy. Moreover, countless courts, including this Court, quote statutes citing the FTCA's remedy provisions ("sections 1346(b) and 2672"), but replace these section numbers with "[the FTCA]," presumably for ease of reading. *See, e.g., Smith*, 499 U.S. at 165-66.

Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 51:7 (7th ed. 2009). Because § 233(a) adopts the FTCA's general remedy provisions to define the scope of immunity available to PHS medical personnel, it must be read in conjunction with subsequent amendments to the FTCA's remedy provisions—including the 1988 amendment expressly preserving *Bivens* actions against all government employees.[7]

Nonetheless, the government argues that reading § 233(a) as incorporating the FTCA's amendments embodied in the LRTCA "would amount to an implied repeal of Section 233(a)." U.S. Br. 14.[8] This argument

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[7] The FTCA, as referenced in § 233(a), is a "general" reference because "the general rule [is] that incorporations by reference are designated as general and effect is given to subsequent amendments." Singer, *Sutherland Statutory Construction*, *supra*, at § 51:7; *see, e.g.*, *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1112-13 (5th Cir. 1991) (statute incorporated all amendments to "the provisions of the Longshoremen['s] . . . Act, approved March 4, 1927 (44 Stat. 1424)" because this language, as it appeared in statute, was a "general reference"); *U.S. v. Rodriquez-Rodriguez*, 863 F.2d 830 (11th Cir. 1989) (statute incorporated all amendments to "the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 960)" because this language, as it appeared in statute, was a "general reference").

[8] The government's related argument, that the alleged "implied repeal" violates the canon of statutory construction that the "specific trumps the general" (U.S. Br. 14), also fails because this canon does not apply where, as here, the "specific" statute involved explicitly references the general one. This case is therefore distinguishable from *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007), *cited in* U.S. Br. 14, because

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is unavailing. As the court below noted, subsection (a) of § 233 "remains the lynchpin of the entire balance of the section," as other subsections of § 233 have extended the immunity provided by subsection (a) to individuals "deemed to be an employee of the Public Health Service." Pet. App. 31a (citations omitted). Thus, § 233(a) is not impliedly repealed by the LRTCA because it serves the purpose of extending immunity from malpractice and negligence actions to these other types of individuals and entities that are not "employee[s] of the Government" under the LRTCA.

b. Historical context

In accordance with *Carlson*, the court below supported its reading of § 233(a) by analyzing the historical context in which Congress enacted § 233(a) and found no evidence that Congress intended this immunity to extend to constitutional violations.

As this Court has recognized, "[p]ublic context is especially important in examining Congress's enactment (or re-enactment) of . . . verbatim statutory text,'" *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001), as "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context," *FDA v. Brown & Williamson*

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the two regulations at issue in *Long Island Care*—which provided conflicting definitions of the same term—did not reference each other in any way. 551 U.S. at 169.

Tobacco Corp., 529 U.S. 120, 132-33 (2000), *quoted in* Pet. App. 20a-21a; *see also Carlson*, 446 U.S. 19-20 (considering historical context in concluding that "Congress views FTCA and *Bivens* as parallel, complementary causes of action").

The court below noted that Congress enacted § 233(a) six months before this Court decided *Bivens*.[9] Pet. App. 21a. Moreover, § 233(a) predates by nearly six years *Estelle v. Gamble*, 429 U.S. 97 (1976), which established a remedy under the Eighth Amendment for "deliberate indifference" to a prisoner's serious medical needs. Pet. App. 19a, 21a. This historical context led the court below to conclude that, because "direct constitutional remedies . . . were not recognized at the time of [§ 233(a)'s] passage," an "ordinary reader . . . would have understood 'any other civil action or proceeding' with respect to 'personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions' to refer . . . to a host of common-law and

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[9] Petitioners' and their *amici*'s argument that Congress must "have been aware . . . of the concept of a constitutional tort" at the time it enacted § 233(a) (Migliaccio Pet. 9 n.5; *see also* U.S. Br. 16 n.8) is meritless. *Bell v. Hood*, 327 U.S. 678 (1946), declined to rule on the appropriateness of a remedy against federal employees for Fourth Amendment violations, and the district court on remand held that no such cause of action existed. *See* 71 F. Supp. 813, 817 (S.D. Cal. 1947). Between *Bell* and *Bivens*, no reported decision had held that a claim against federal officials existed for constitutional violations. Thus, Congress could not "have been aware" of the concept of a constitutional tort claim when it enacted § 233(a).

statutory malpractice actions," *not* actions alleging constitutional violations. *Id.* at 21a-22a.

c. Legislative history

In accordance with *Carlson*, the court below also supported its reading of § 233(a) by analyzing the legislative histories of § 233(a) and the LRTCA (Pet. App. 22a, 26a-28a), concluding that Congress intended § 233(a)'s immunity to extend only to common-law malpractice and negligence actions—not *Bivens* actions.[10]

The LRTCA's legislative history in particular compels this conclusion. Congress passed the LRTCA to restore the scope of existing remedies prior to this Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Specifically, Congress passed the amendment to provide all federal employees—including those covered by pre-LRTCA immunity statutes like § 233(a)—with immunity from common-law torts and to preserve personal liability for constitutional violations. *See, e.g.*, H.R. Rep. No. 100-700, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948 (explaining that the effect of the LRTCA "is to *return* Federal employees to the status they held prior to the Westfall decision," and that "[s]uch an exclusive remedy *has already been enacted* to cover the

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[10] *Carlson* likewise considered legislative history in concluding that the FTCA does not preclude *Bivens* actions. 446 U.S. 19-20.

activities of certain Federal employees") (emphasis added); *id.* at 6 (stating that this law "*would not affect* the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights") (citations omitted; emphasis added); 134 Cong. Rec. 29933 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley) (noting that "this bill does not have any effect on the so-called Bivens cases or Constitutional tort claims, . . . *which can continue to be brought against individual Government officials*") (emphasis added). These statements show that Congress never intended § 233(a)'s immunity to extend to *Bivens* actions.[11]

In 1988, the government endorsed the view that the LRTCA's express preservation of *Bivens* remedies was consistent with pre-LRTCA immunity statutes, including § 233(a). *See, e.g., Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Government Relations of the H. Comm. on the Judiciary*, 100th Cong. 78 (1988) (statement of Robert Willmore, Deputy Assistant Attorney General) ("Persons alleging constitutional torts will, under [the LRTCA] *remain free* to pursue a remedy against the individual employee if they so choose.") (emphasis added); *id.* at 58, 76 (stating that "the exclusive remedy provision adopted by the [LRTCA] is based on" similar

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[11] When Congress passed the LRTCA, no court had held that § 233(a)'s immunity extended to *Bivens* actions.

provisions applicable "to drivers of vehicles, to physicians employed by various agencies, and to Department of Defense attorneys" and "would do nothing more than extend the protection now enjoyed by doctors, drivers, and DoD [Department of Defense] attorneys to *all* federal employees. It will ensure *equitable and consistent treatment for persons injured by federal conduct, without regard to the status of the employee whose actions are alleged to have caused the injury*.") (emphasis added).

Moreover, as the court below noted, § 233(a)'s legislative history shows that Congress sought to protect PHS personnel from common-law tort actions only. Pet. App. 22a ("The only two statements on the floor of either house of Congress respecting [§ 233(a)] mentioned only medical malpractice, with nothing being said about constitutional violations."). This is not surprising, given that Congress enacted § 233(a) before this Court recognized remedies for constitutional violations by federal employees.

Thus, the legislative histories of § 233(a) and the LRTCA show that Congress did not intend § 233(a) to bar *Bivens* actions. When Congress enacted the LRTCA, it made explicit what it had intended all along: that victims of constitutional violations would remain free to pursue a remedy against all federal employees, including those covered by pre-LRTCA immunity statutes like § 233(a).

* * *

In short, contrary to Petitioners' claims, the court below never required a showing of "magic words" demonstrating the unavailability of a *Bivens* remedy. Instead, the court's examination of the plain language, historical context, and legislative histories of § 233(a) and the LRTCA followed *Carlson* precisely, and led the court to conclude that § 233(a) does not bar *Bivens* actions. Nonetheless, in one final effort to convince this Court that the decision below conflicts with *Carlson*, Petitioners and their *amici* claim that the court departed from dicta in *Carlson* describing § 233(a) "as an example of an explicit congressional declaration of FTCA exclusivity." Migliaccio Pet. 8; *see also* Henneford Pet. 14-15; U.S. Br. 18. This argument is based on a misreading of the dicta which, in its entirety, states:

> This conclusion [that Congress views FTCA and *Bivens* as parallel, complementary causes of action] is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U.S.C. § 4116(a), 42 U.S.C. § 233(a), 42 U.S.C. § 2458a, 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (*malpractice* by certain Government health personnel); 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); and 42 U.S.C. § 247b(k) (manufacturers of swine flu vaccine).

Carlson, 446 U.S. at 20 (emphasis added). As the court below recognized, "[i]n the middle of a discussion about *Bivens* preemption, it is easy to skip

over what, buried in a string citation, the Supreme Court actually said was preempted under § 233(a), et al., i.e., actions for 'malpractice.'" Pet. App. 35a. The court emphasized that this dicta listed § 233(a) as an example of a congressional declaration of FTCA exclusivity for actions alleging "*malpractice by certain Government health personnel*" (*id.*), *not* actions alleging constitutional violations. This limitation matters because none of the parties here disputes that § 233(a) makes the FTCA the exclusive remedy for "malpractice by certain Government health personnel." What *is* disputed—and what this dicta does *not* address—is whether § 233(a) immunity extends not only to "malpractice by certain Government health personnel," but to constitutional violations. The court of appeals held that § 233(a) immunity extends *only* to "malpractice by certain Government health personnel," which is consistent with *Carlson*'s description of § 233(a) as an example of when "Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy . . . [for] malpractice by certain Government health personnel." 446 U.S. at 20.[12]

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[12] The *Carlson* dicta clearly does not address immunity from *Bivens* actions because the other types of federal employees listed (motor vehicle operators and swine flu vaccine manufacturers) do not perform actions that could rise to the level of a constitutional violation. Those federal employees can only commit common-law torts within the scope of their employment.

Accordingly, the court below correctly applied *Carlson* in concluding that Petitioners failed to identify any congressional declaration that the FTCA remedy would be a substitute for recovery under *Bivens* for constitutional violations committed by PHS personnel.

2. Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief.

In accordance with *Carlson*'s conclusion that Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief, the court below found "no basis" for distinguishing *Carlson* here. Pet. App. 13a-14a. The court explained that, in both cases: (a) "FTCA damages remain recoverable only against the United States and . . . punitive damages remain unavailable"; (b) "an FTCA plaintiff still cannot demand a jury trial"; and (c) the "FTCA remedy continues to depend on the 'law of the place where the act or omission occurred,'" which poses a threat to national uniformity. *Id.* at 16a (citations omitted).

Petitioners and their *amici* claim that the decision below misapplied *Carlson* on the ground that "there is no 'equally effective' prong" to the *Carlson* test. Migliaccio Pet. 12; *see also* Henneford Pet. 13-14; U.S. Br. 19. This is incorrect. *Carlson* states that *Bivens* remedies are unavailable only when federal defendants show "that Congress has provided an

alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution *and viewed as equally effective*." 446 U.S. at 18-19 (emphasis added); *see also McCarthy v. Madigan*, 503 U.S. 140, 151 (1992) ("We have recognized that a *Bivens* remedy does not lie . . . where Congress has provided an equally effective alternative remedy *and* declared it to be a substitute for recovery under the Constitution. . . .") (emphasis added).

The cases Petitioners and the government cite in support of their argument are inapposite. For example, *Wilkie v. Robbins*, 551 U.S. 537 (2007), considered only whether to create a *Bivens* remedy in a new context for a landowner alleging harassment against the Bureau of Land Management. *Wilkie* does not address *Carlson*'s holding that a *Bivens* remedy is available unless Congress has provided an "equally effective" alternative remedy explicitly declared to be a substitute for recovery directly under the Constitution.[13]

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[13] The same is true of the other cases cited by Petitioners and the government. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (noting, with no mention of *Carlson*, that the Court "has been reluctant" to extend *Bivens* liability to new contexts); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (declining to extend *Bivens* remedies to claims against a corporate entity on the ground that the defendant was not a federal officer); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (declining to extend *Bivens* remedies to redress mishandling of Social Security applications); *Bush v. Lucas*, 462 U.S. 367 (1983)

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3. There are no "special factors" that preclude *Bivens* relief here.

Finally, the court below analyzed whether a *Bivens* action would be precluded due to "special factors counseling hesitation in the absence of affirmative action by Congress." Pet. App. 37a-39a (quoting *Carlson*, 446 U.S. at 18). The court concluded that "the statutory remedies provided in the FTCA do not constitute a comprehensive remedial scheme and cannot serve as a 'special factor' precluding *Bivens* relief." Pet. App. 39a.

Petitioners and their *amici* argue that "special factors" exist here because, after *Carlson*, this Court has declined to extend *Bivens* liability to new contexts. Henneford Pet. 24; Migliaccio Pet. 14; U.S. Br. 18-19. To support this claim, they cite the same cases that they cited to support their argument that there is no "equally effective" prong to the *Carlson* test. *Id.* These cases are inapposite because, as explained above, they only address whether *Bivens* remedies may be recognized in new contexts. However, Respondents' *Bivens* claims for deliberate indifference to serious medical needs and denial of equal protection are well established.[14]

(declining to extend *Bivens* remedies to redress First Amendment violation).

[14] *See Carlson*, 446 U.S. at 20 (recognizing *Bivens* remedy for deliberate indifference to prisoner's serious medical needs); *Davis v. Passman*, 442 U.S. 228, 235, 248-49 (1979) (recognizing

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Although the court below recognized that, after *Carlson*, this Court has found other remedial schemes to be "special factors" precluding *Bivens* relief, the court noted that none of those decisions has "overruled *Carlson*'s square holding that there are no special factors that preclude a *Bivens* action in a case whose facts and posture mirror this one." Pet. App. 38a. *Carlson*'s holding that the FTCA is not a "special factor" precluding *Bivens* relief remains good law and compelled the court below to reject Petitioners' "special factors" argument.[15]

* * *

For all of these reasons, the decision below is consistent with *Carlson*. *Carlson* places the burden on Petitioners to show an "explicit declaration" from Congress that § 233(a) precludes *Bivens* claims. The court below followed that directive and conducted an extensive analysis of the language, historical context, and legislative history of § 233(a) and the LRTCA, concluding that Congress did not intend § 233(a) to bar *Bivens* actions against PHS medical personnel.

Bivens remedy for violation of equal protection component of Fifth Amendment Due Process Clause).

[15] In any event, Congress has taken "affirmative action" with respect to the question presented here by expressly preserving *Bivens* actions against all federal employees under the LRTCA. Thus, there is no "absence of affirmative action from Congress" that would warrant examining the "special factors" test. *See Carlson*, 446 U.S. at 18.

B. The Decision Below Is Consistent With *Smith*.

The decision below also comports with this Court's immunity analysis in *Smith*, 499 U.S. 160, *cited in* Pet. App. 29a-30a, a case that Petitioners and their *amici* ignore. *Smith* presented the question of whether the LRTCA immunizes government employees from suit even when the FTCA foreign-country exception precludes recovery against the United States. In concluding that the LRTCA conferred immunity on a defendant military physician, *Smith* analyzed the relationship between the LRTCA and the Gonzalez Act, 10 U.S.C. § 1089(a), an immunity statute virtually identical to § 233(a). 499 U.S. at 170. The Court explained that the Gonzalez Act was "one in a series of immunity statutes . . . designed to protect certain classes of Government employees from the threat of personal liability."[16] *Id.* The other statutes in that series include 22 U.S.C. § 2702 (State Department medical personnel), 38 U.S.C. § 4116 (Veterans' Administration medical personnel), and § 233(a) (PHS medical personnel). *Id.* at 170 n.11. The Court concluded that when Congress passed the LRTCA, it was well aware of these pre-LRTCA immunity statutes and intended no distinction between

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[16] The Court also stated that the "Gonzalez Act functions *solely* to protect military personnel from *malpractice* liability." 499 U.S. at 172 (emphasis added). This is exactly how the court below interpreted the virtually identical provision of § 233(a).

"employees who are covered under pre-Act immunity statutes [such as the Gonzalez Act and § 233(a)] and those who are not." *Id.* at 173. Instead, the Court noted that Congress sought to have the same scope of immunity extend to *all* government employees. *Id.*

The respondents in *Smith* had argued, as the government argues here (U.S. Br. 14), that the LRTCA was meant to apply only to those government employees not already protected from liability by a pre-existing federal immunity statute. 499 U.S. at 172-73. Specifically, the respondents in *Smith* argued that military medical personnel and other government employees who were protected by pre-LRTCA immunity statutes—like § 233(a) and the Gonzalez Act—cannot benefit from the immunity available under the LRTCA. *Id.* The Court rejected this construction as "inconsistent with Congress' purpose in enacting the [LRTCA]." *Id.* at 173. The Court noted that no language in § 2679(b) of the LRTCA or elsewhere "purports to restrict the phrase 'any employee of the Government' . . . to reach only employees not protected from liability by another statute." *Id.*[17] In reaching this conclusion, the Court

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[17] The LRTCA defines "[e]mployee of the government" to include "officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard, . . . and persons acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671. In *Smith*, the government conceded that the "language [of the LRTCA] leaves no leeway for an unstated exception to the [LRTCA]" for members of the military, and that the term "employee of the

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explained, "[w]hen Congress wanted to limit the scope of immunity available under the [LRTCA], it did so expressly, as it did in preserving employee liability for *Bivens* actions. . . . We must conclude that if Congress had intended to limit the protection under the Act to employees not covered under the pre-[LRTCA] statutes, it would have said as much." *Id.*

Similarly, if Congress had intended to limit the LRTCA's express preservation of *Bivens* actions to "employees not covered under the pre-[LRTCA] statutes," it would have said as much. There is no language in the LRTCA suggesting that Congress intended to exempt some federal employees from its limitations on immunity while allowing them to enjoy the benefits of the LRTCA's protections.

Thus, *Smith* further supports the decision below and demonstrates that review is not warranted based on any conflict with this Court's jurisprudence.

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government" "unquestionably encompasses all members of the military," notwithstanding pre-LRTCA immunity statutes applicable to military members. Brief of Petitioner United States, *United States v. Smith*, No. 89-1646, 1990 WL 505624, at *10, *34 (July 26, 1990). Here, the government argues that the LRTCA does not "limit or otherwise have a bearing on the distinct . . . personal immunity conferred in separate statutes like Section 233(a)." U.S. Br. 14. This position conflicts with both the government's position in *Smith*, and with *Smith* itself, which rejected the argument that the LRTCA has no bearing on the immunity conferred by pre-LRTCA immunity statutes like § 233(a). 499 U.S. at 172-73.

II. THERE IS NO MEANINGFUL CIRCUIT SPLIT HERE.

Petitioners and their *amici* also argue that review is warranted based on a split between the Second and Ninth Circuits. Henneford Pet. 14-15; Migliaccio Pet. 16; U.S. Br. 7. However, the "split" here does not warrant review because it is both shallow and unreasoned.

First, in the thirty-eight years since *Bivens* was decided, only two published appellate decisions have addressed the question presented: the decision below and *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000). The other appellate decisions cited by Petitioners and their *amici* (Henneford Pet. 4 n.1; Migliaccio Pet. 5 n.3; U.S. Br. 8 n.4) are unpublished and have no precedential authority in the circuits where they were decided.[18] Moreover, the vast majority of the district court cases to which Petitioners and their *amici* cite (Henneford Pet. 4 n.1; Migliaccio Pet. 6 n.4; U.S. Br. 8 n.4) are unreported, *pro se*, and are mere affirmnces of *Cuoco* that conduct no independent analysis. This Court would benefit from the views of other appellate courts that, when faced with this issue, will undoubtedly turn to the Ninth Circuit's analysis for guidance. Further percolation among the courts may lead to an appellate consensus in favor of

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[18] *See Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 339 (4th Cir. 2009); *U.S. v. Weatherton*, 567 F.3d 149, 154 (5th Cir. 2009); *U.S. v. Keith*, 559 F.3d 499, 505 (6th Cir. 2009); *U.S. v. Jasin*, 280 F.3d 355, 367 (3d Cir. 2002).

the Ninth Circuit's view, and would—at a minimum—provide this Court the benefit of a thorough discussion of the question presented.

Second, review is not warranted because the conflict between the decision below and *Cuoco* is unreasoned at best. The court below, unlike the Second Circuit, reached its holding after considering § 233(a)'s and the LRTCA's texts, historical contexts, and legislative histories, as well as this Court's immunity analyses in both *Carlson* and *Smith*. *Cuoco* based its holding upon a cursory reading of § 233(a) and the same misinterpretation advocated by Petitioners of the *Carlson* dicta discussed above, which it erroneously read to imply that § 233(a) was an expressly declared *Bivens* substitute. 222 F.3d at 108. Had *Cuoco* examined the factors considered by the court below to reach its holding, then its ruling might present a meaningful conflict. Given the shallow, unreasoned split here, review would be premature.

III. PETITIONERS AND THEIR *AMICI* OVERSTATE THE IMPACT OF THE DECISION BELOW.

Petitioners and their *amici* further claim that review is warranted on the ground that the decision below will affect the ability of PHS and similar agencies to operate effectively by hindering these agencies' ability to recruit, hire, and retain medical personnel. *See* Henneford Pet. 30; Migliaccio Pet. 15;

U.S. Br. 9-10; Commissioned Officers Association of the U.S. Public Health Service, Inc. Br. (C.O.A. Br.) 6, 8. However, the practical and legal realities of the circumstances under which federal employees provide medical services, including the fact that the government routinely defends and indemnifies the medical personnel providing those services, demonstrate that the impact of the decision below will be far less significant than claimed and will promote—not undermine—national uniformity.

A. The Decision Below Will Affect Only A Small Subset Of PHS Personnel.

The decision below will affect only a small subset of PHS personnel and, even as to those individuals, exposure to *Bivens* liability will be insignificant given the reality that the government defends and indemnifies its personnel as a matter of course.

The only federal employees who will be affected by this case are those who perform medical or related functions for PHS in a custodial setting such as a prison or detention center. Constitutional rights are not implicated when the recipient of the medical services is not in custody. *See Estelle*, 429 U.S. at 104 (holding that "deliberate indifference to serious medical needs of prisoners" constitutes a violation of the Eighth Amendment proscription against "unnecessary and wanton infliction of pain"); *see also Carlson*, 446 U.S. at 23 (recognizing a *Bivens* remedy for Eighth Amendment violations alleging deliberate

indifference to the serious medical needs of prisoners).

Thus, the government's argument that the decision below may affect Department of Veterans' Affairs and Department of Armed Services' medical personnel (U.S. Br. 9) lacks merit because these individuals do not provide medical care in custodial settings. Likewise, the argument that employees of "federally funded community health centers" will face *Bivens* liability (*id.*) fails because "community health center" personnel provide medical services in non-custodial settings, where constitutional rights are not implicated. The same is true for medical personnel who respond to national emergencies and terrorist attacks. *See* C.O.A. Br. 8-10. Thus, the reality is that only a small subset of PHS personnel who work in custodial settings will be subject to *Bivens* actions,[19]

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[19] According to available statistics, PHS employs 6,000 commissioned officers. U.S. Pub. Health Serv. Commissioned Corps., *About the Commissioned Corps. Questions*, http://www.usphs.gov/aboutus/questions.aspx#whatis (last visited July 21, 2009). Of those, 750 are deployed to the BOP, *see* Federal Bureau of Prisons, *Central Office: Health Services Division*, http://www.bop.gov/about/co/health_services.jsp (last visited July 21, 2009), and 315 are deployed to the DIHS, *see* U.S. Immigration and Customs Enforcement, DRO: Detainee Health Care (Nov. 19, 2008), *available at* http://www.ice.gov/pi/news/factsheets/detaineehealthcare.htm (noting that DIHS employs 684 medical professionals); Alicia Puente Cackley, Government Accountability Office, *DHS: Organizations Structure and Resources for Providing Health Care to Immigration Detainees* at 21 (Feb. 23, 2009), *available at* http://purl.access.gpo.gov/GOP/LPS113214 (noting that 46% of DIHS medical professionals are

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which explains why there are no decisions addressing *Bivens* liability in the context of other pre-LRTCA immunity statutes.

Moreover, even as to this limited subset of PHS personnel, the practical implications of this case are not as great as Petitioners and their *amici* claim. First, the decision below does not affect the immunity conferred on PHS medical providers from malpractice and negligence actions under § 233(a).[20] Rather, only those medical providers who are deliberately indifferent to the constitutional rights of prisoners and detainees will be subject to *Bivens* liability. Neither Petitioners nor their *amici* offer evidence suggesting that the remote possibility of a PHS medical provider violating the Constitution, and then being held liable under *Bivens*, will affect the efficient operations of PHS or its medical personnel. In fact, the practical realities suggest otherwise, as medical personnel employed by the BOP are already subject

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PHS commissioned officers). Thus, out of 6,000 PHS commissioned officers, only 1,065 (or 17%) might provide medical services in custodial settings where they could be subject to *Bivens* claims. Moreover, the number of PHS officers affected by the decision below is smaller still, given that the decision applies in only one circuit.

[20] Nor does it affect PHS medical providers' right to raise a qualified immunity defense, which enables them to obtain dismissal of meritless constitutional claims at an early stage of litigation and a stay of discovery through interlocutory appeal, *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), and enables courts to manage such claims with minimal disruption to the government.

to *Bivens* actions under *Carlson*, 446 U.S. at 23, yet there is no evidence in the record showing that this potential for liability has prevented the BOP from effectively providing medical care to prisoners.

Second, this case will have little effect on PHS's ability to recruit and retain medical personnel because the government defends and indemnifies these individuals from *Bivens* actions as a matter of course. The United States routinely provides representation to constitutional tortfeasors, 28 C.F.R. § 50.15 (2008), and "virtually without exception" indemnifies its officers and employees against adverse *Bivens* judgments. Cornelia Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 67 (1999) (citing Memorandum for Heads of Department Components from Stephen R. Colgate, Assistant Attorney General for Administration (June 15, 1998)); *see also* 45 C.F.R. § 36.1 (2009) (authorizing indemnification of Department of Health and Human Services employees). As such, the threat of *Bivens* actions will not dissuade physicians or other medical providers from working for PHS in *any* jurisdiction, which explains why neither Petitioners nor their *amici* have offered any evidence to support their speculation to the contrary.

B. The Decision Below Promotes National Uniformity.

The United States also argues that holding PHS personnel liable for constitutional violations

frustrates national uniformity because it "may have implications" for medical personnel employed by other agencies. U.S. Br. 10. This argument is premised on the faulty assumption that these other federal employees are immune from *Bivens* actions. As explained above, however, BOP medical personnel are already subject to *Bivens* actions under *Carlson*. Thus, the decision below actually *advances* a nationally uniform rule because, just as other federal employees are subject to *Bivens* actions by virtue of the LRTCA, so too are PHS personnel. Pet. App. 34a (noting that the "LRTCA was passed to abolish . . . arbitrary distinctions" between the immunity afforded different types of federal employees). In reality, the position taken by Petitioners and their *amici*—that PHS personnel should be granted immunity from *Bivens* actions while, under the LRTCA, all other employees are not—would undermine national uniformity.

The court below therefore properly rejected the argument that Congress sought to provide PHS personnel "with the privilege, shared with no other federal employees, to *violate the Constitution* without consequence." *Id.* (emphasis in original) (citing *Malesko*, 534 U.S. at 76 for the proposition that, "we [never] suggested that a category of federal agents can commit Eighth Amendment violations with impunity"). This double-standard cannot be the result Congress intended, and would likely create

significant administrative problems for the government.[21] Because the decision below promotes, rather than undermines, national uniformity, this case will not adversely impact the real-world operations of PHS or other agencies that provide medical services.

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[21] Another consequence of this double-standard would be that PHS doctors could perform another Tuskegee Syphilis experiment without facing any personal liability for such egregious constitutional violations. At oral argument, Judge Milan Smith, Jr., asked counsel for the United States, "Is it the Government's position that were the PHS to engage in a Tuskegee Syphilis experiment today that there would be no Constitutional claim against the PHS because of § 233(a)?" Respondents' App. 19a. Counsel for the United States admitted, "It is, Your Honor, even for . . . the most egregious misconduct such as that. . . ." *Id.*

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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IN CALIFORNIA:

UNITED STATES COURT OF APPEALS,
NINTH DISTRICT

YANIRA CASTANEDA, ET AL. Plaintiffs-Appellees	:	Case No.
v.	:	08-55684
CHRIS HENNEFORD, ET AL. Defendant-Appellants	:	

Pasadena, California
August 15, 2008

ORAL ARGUMENT BY COUNSEL

Transcript of Oral Argument by Counsel in the above-captioned matter before the Ninth Circuit Court of Appeals, JUSTICE STEPHEN REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR., Circuit Judges.

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* * *

PROCEEDINGS

[4] WHEREUPON,

The following transcript was requested by Mr. Conal Doyle:

MR. ROBERT GRAHAM: Good morning. I'm Robert Graham for the Appellants in this matter. Uh, as the Court is aware, this entire appeal turns on the question of the scope of immunity available to PHS personnel under 42 USC §233(a).

More specifically, the question before the Court is what the plain language of the statute provides in that regard. It is the Appellant's position that the only way to give any real meaning to §233(a) of the PHS Act is to – is to read the scope of immunity to extend not only to common law torts, but also to Bivens actions.

The plain language of the statute makes clear that it is exclusive – exclusive of all liability; that is to say the FTCA is the exclusive remedy for all liability arising out of the performance of medical and related functions by PHS officers and civilian employees.

JUSTICE MILAN SMITH: Counsel, aren't you overlooking a few things? This – this statute was passed in 1970 before the Bivens case was decided, wasn't it?

MR. ROBERT GRAHAM: It was.

JUSTICE MILAN SMITH: And subsequent to that time, there've been all kinds of cases and glosses, [5] Carlson being among the most important, that have defined if you will, a parallel track. Does the Government dispute that?

MR. ROBERT GRAHAM: Well I cannot speak for the Government. I'm representing –

JUSTICE MILAN SMITH: Okay.

MR. ROBERT GRAHAM: – uh –

JUSTICE MILAN SMITH: Okay, well let's – let's take it – take it for the – for the – for the Appellant directly then.

MR. ROBERT GRAHAM: For – for – for the Appellants directly, we don't dispute that there, uh, that in certain circumstances, in fact, most circumstances under the FTCA, Bivens claims can proceed parallel to FTCA claims.

JUSTICE MILAN SMITH: But isn't – isn't – isn't 23 – §233(a) designed to cover garden variety torts, medical claims? I mean there are many, many statutes. I think I have like 14 that deal with everything from Department of Defense lawyers to people involved in the atomic energy area that refer back to the statute.

And yet they're not protected from Bivens claims. Why – why should the public health service be any different?

[6] MR. ROBERT GRAHAM: Well, I would dispute that the, uh, I'm presuming that the – the other statutes to which you're referring include the Gonzalez Act, for instance, which appears at 10 USC §1089. It's certainly not clear that – that Bivens liability extend – it can – it's co-extensive with or is – can run parallel with FTCA liability in that circumstance.

JUSTICE MILAN SMITH: Well for example, 10 USC §1054(a) deals with legal malpractice by Department of Defense lawyers. Are you suggesting

that there's no Bivens Act liability for Department of Defense lawyers on extraordinary matters?

MR. ROBERT GRAHAM: I can't speak to that statute because it's not – it's not a statute with which I'm familiar. I'm not familiar with the text of what it says. I can't tell you whether it has the same sort of language that –

JUSTICE MILAN SMITH: Well it refers back –

MR. ROBERT GRAHAM: – the Section 1054 –

JUSTICE MILAN SMITH: – to 23 – I mean §233(a). And – I'm sorry, excuse me. It does not refer back to that. It refers back to §1346(b) and §2672 of Title 28.

MR. ROBERT GRAHAM: It –

JUSTICE MILAN SMITH: Which is the same remedy [7] section that 23 – §233(a) refers to.

MR. ROBERT GRAHAM: Um, again, uh, since I don't have the text of that statute in front of me, I can't speak directly to it. However, the mere fact that it incorporates the remedy available under §1346(b) and §2672 says nothing of the exclusivity of that remedy.

By contract when you're looking –

JUSTICE MARSHA BERZON: Well it – it – it says something because it's the remedy is only –

the remedy that's being incorporated is as broad as the remedy is. And if the remedy is by its own terms not applicable to some subset of cases then what is in fact the nature of the remedy part of what's being incorporated?

MR. ROBERT GRAHAM: Well I think the – that really gets to the nub of the issue here and I think that that's where the confusion in the District Court lies.

The fact that a remedy might not be exclusive is not to say that that remedy is not available. And that's precisely the case that we're looking at; for instance in the – in the Carlson context or in the post-1988 FTCA context.

You can have a remedy against the United States and at the same time, a remedy against an individual employee of the Federal Government directly absent some sort of expressed exclusive language.

[8] That is precisely the language that we are looking at in §233(a).

JUSTICE MARSHA BERZON: Well first of all, if – if §2679, if – if its Durlow would definitely apply to these people, right, because it's – it talks about – it applies to all employees? And – both affirmatively and negatively because what actually happened was, essentially Congress later added in the Westfall Act, a – an exclusivity provision for everybody to parallel the one that had existed earlier for §233 and for the – for the public health employees.

MR. ROBERT GRAHAM: I'm sorry, it's, uh –

JUSTICE MARSHA BERZON: Isn't that right?

MR. ROBERT GRAHAM: – um, what – the – the intention as I understand it from the legislative history to the Westfall Act is that they wanted to provide a – a similar, uh, exclusive remedy to what was already available to DOD employees, PHS –

JUSTICE MARSHA BERZON: But it applies to any employee of Government. So it applies on its face to these same people?

MR. ROBERT GRAHAM: It – it is – it – it applies to – let me – if I understand what you're asking – what I would suggest is that there are two types of immunity available to PHS employees, depending on the [9] context.

They can avail themselves of the protections of §2679(b)(1) or they can avail themselves of the protection of 42 USC §233(a).

JUSTICE MARSHA BERZON: But what if – is that the same? Are they not in fact the same?

MR. ROBERT GRAHAM: They are not exactly the same because one is exclusive with certain qualifications and the other is exclusive in all instances.

JUSTICE MILAN SMITH: How can you read the statute that way, Counsel? If – if you look at §233(a), it says, "The remedy against the United

States provided by §1346(b) and §2672 of Title 28," and skipping the alternative, which doesn't apply here, "shall be exclusive of any other actions."

So it tells you where the remedy is found and – and in this particular case, you go to §1346(b) and that refers to Chapter 171, which includes an express exemption in a section of that for Bivens Act – I mean not Bivens Act – Bivens claims.

Why isn't that the remedy?

MR. ROBERT GRAHAM: Well again, I think it gets back to the question of the availability of the remedy versus the exclusivity of that remedy – of that remedy.

[10] JUSTICE MILAN SMITH: But that's sophistry, isn't it?

MR. ROBERT GRAHAM: It's not sophistry precisely because there is an available remedy against the United States even –

JUSTICE MILAN SMITH: Well there –

MR. ROBERT GRAHAM: – in circumstances –

JUSTICE MILAN SMITH: – is but – but as the Supreme Court pointed out in Carlson, there are at least four major differences between a Bivens claim and one against the United States exclusively.

One that strikes me as being particularly bizarre if you follow your line of thinking is, you take medical

malpractice. I mean here in California, there's a $250,000 limit on pain and suffering. Other states have a $1.5 billion claim limitations. Others have no limitation at all. Others have some kind of a predicate proceeding that has to follow a filing of such an action.

How can that be a substitute for a Bivens claim?

MR. ROBERT GRAHAM: It can be a substitute as Congress expressly declares it to be so.

JUSTICE STEPHEN REINHARDT: Well and if it's equally effective. The – the sentence is it – it – when – "When Defendants show that Congress has provided an alternative remedy which it explicitly declared a [11] substitute for recovery, directly under the Constitution and viewed as equally effective."

Now, didn't in Carlson, the Court make it clear that just the ordinary tort claim under the Federal Tort Claims Act is not equally effective?

MR. ROBERT GRAHAM: Um, uh, well again, if you're not dealing – if – if – the way that the Courts have refined that language in Carlson, including this Court, is to read it to say if Congress has expressly declared this remedy to be an exclusive remedy that is sufficient.

You find that in Moore vs. Blakeman, Your Honor, a 1997 I believe it is. The Court's going to be loathe to question the Congress's judgment as to

whether a remedy – an exclusive remedy is an adequate remedy in a particular circumstance.

JUSTICE MILAN SMITH: But where has Congress said that §233(a) and the remedies provided therein as you construe it is a substitute for Bivens? Where is that?

MR. ROBERT GRAHAM: Well, as the Court indicated in, I guess it's Footnote Five in Carlson v. Green, you don't need to have that kind of magic language that says explicitly that this – that this remedy shall be an adequate substitute for a Constitutional tort claim directly against an employee under Bivens.

[12] JUSTICE MARSHA BERZON: Well –

JUSTICE STEPHEN REINHARDT: But this is –

JUSTICE MARSHA BERZON: – certainly –

JUSTICE STEPHEN REINHARDT: – before Bivens –

JUSTICE MARSHA BERZON: – at the time the –

JUSTICE STEPHEN REINHARDT: – wasn't it?

JUSTICE MARSHA BERZON: – statute was passed, I'm sorry. Certainly at the time the statute was passed they weren't doing that because Bivens didn't exist.

MR. ROBERT GRAHAM: That's correct, but you do have the Supreme Court in Carlson, which is post-Bivens obviously citing the PHS Act as an example where the Congress has expressly provided the FTCA as an exclusive remedy.

JUSTICE MARSHA BERZON: Well and obviously it's an exclusive remedy for something. The question is for what? In other words, this – this is just an observation, which is true that §233(a) is exclusive as to some subset of – of – of alternatives.

But the question is, what's the subset.

MR. ROBERT GRAHAM: When you look at §233(a) itself, the text, it's all liability. Unlike the other pre-immunity statute –

JUSTICE MILAN SMITH: But – but that – but [13] that statute was enacted before Bivens was decided. So it – by no means does it close the field of inquiry does it?

MR. ROBERT GRAHAM: It closes the field of inquiry as to all liability, whether it –

JUSTICE MILAN SMITH: However Congress –

MR. ROBERT GRAHAM: – whether an additional factor –

JUSTICE MILAN SMITH: – however, Congress changed the law subsequent to that point.

MR. ROBERT GRAHAM: Excuse me?

JUSTICE MILAN SMITH: However Congress changed the law subsequent to that point.

MR. ROBERT GRAHAM: Well if you're to suggest that there's a – that a statutory cause of action might arise for –

JUSTICE MILAN SMITH: No, what – what I'm –

MR. ROBERT GRAHAM: – some –

JUSTICE MILAN SMITH: – saying is this, the – the – the first part of §233(a) talks about what the remedy is. It cites other sections.

Those other sections have been amended in the – and the references therein. I mean have you ever done any Internal Revenue Code work, you know they have a code section here, the code section there; everything refers to this, that and the other.

[14] And that's exactly what's happened here. But Congress has provided different things at different times to respond to different circumstances haven't it – hasn't it?

MR. ROBERT GRAHAM: They have. But what the Congress did in §233(a) was to make the FTCA, which is to say the judicial remedy available under §1346(b) and, uh, the administrative remedy under §2672, the exclusive remedy in all instances.

Were the Congress to establish a statutory cause of action for other wrongs under Federal Law, that would be excluded as well –

JUSTICE MARSHA BERZON: But – but –

MR. ROBERT GRAHAM: – unless there is an exception in that law.

JUSTICE MARSHA BERZON: – but – but – go back to where I was before. If, if §233(a) didn't exist, §2679 would – would apply both affirmatively and – and in terms of the exclusion to the – to your clients, right?

MR. ROBERT GRAHAM: If there were no §233(a), correct, yes.

JUSTICE MARSHA BERZON: All right, because it – on its face, it applies?

MR. ROBERT GRAHAM: Correct.

[15] JUSTICE MARSHA BERZON: Because there – there are any – it applies to any employee. I mean you said –

MR. ROBERT GRAHAM: Right.

JUSTICE MARSHA BERZON: – they can pick and choose and I don't know why that is. But it applies to any employees of the Government in – of which these people are some.

MR. ROBERT GRAHAM: That – that's correct and – and if I could –

JUSTICE MARSHA BERZON: So – so – so your burden is to suggest why would it be that when Congress just sign it, to extend the – the narrow

exclusivity of §2333 (sic) to all employees including your clients, it – and it's also decided that that shouldn't apply to a Bivens remedy, they – they had – there's any evidence to that – that there were – they were – they had any reason to and – and did pull out your – your employees from the – from the definition of any employee.

I mean your – your client. I mean it just seems – I mean to me this is even simpler than following around the – the cross references. I mean it – it – just standing on its face they made a decision at this point that for all employees there's an exclusive remedy and an exception.

And why §233 then is an exception to that, I don't [16] know.

MR. ROBERT GRAHAM: Well I think that there are two factors that, uh, to respond to your question.

First, when you look at §2679(b)(2), the first clause of the statute says, (1) shall not apply to Bivens actions or others – or other statutory causes of action.

It doesn't – it says nothing of §233(a). It says nothing of the Gonzalez Act. It says nothing of what we've referred to here as the pre-immunity statute.

JUSTICE MILAN SMITH: But – but –

MR. ROBERT GRAHAM: Yet the –

JUSTICE MILAN SMITH: – but §233(a) says that the remedy is within those sections and if the Congress has changed the remedy, doesn't that also expand or limit the remedy as provided in those two sections?

MR. ROBERT GRAHAM: Well, uh, uh, again, I think it gets, uh, it gets back to our disagreement over whether the remedy has changed itself. And it hasn't. There's been no change in the availability of the FTCA remedy except to the extent that it goes beyond, um, discretionary acts.

Because as the Court is aware, the Westfall Act arose out of the, uh, uh, the judicially created document, official immunity based on discretionary functions versus [17] ministerial functions.

That's effectively what the Westfall Act did. It eliminated that exception to official immunity. Otherwise, the remedy was un-affected.

JUSTICE MILAN SMITH: And they stated at the time that it wasn't designed to affect Constitutional claims, didn't they, in the – the – in the legislative history?

MR. ROBERT GRAHAM: It – it was not – it was – that's precisely our point in fact, that's, uh, the second answer to Judge Berzon's question, which is it – it was intended to have no affect on the availability for good or ill of Constitutional causes of action directly against Federal employees.

JUSTICE MARSHA BERZON: Well –

MR. ROBERT GRAHAM: And – and at that time –

JUSTICE MILAN SMITH: You're –

MR. ROBERT GRAHAM: – Constitution didn't – Bivens claims were not available against PHS Act employees –

JUSTICE STEPHEN REINHARDT: All right –

MR. ROBERT GRAHAM: – minus Carlson.

JUSTICE STEPHEN REINHARDT: – you're beginning to run into the Government's time, so –

MR. ROBERT GRAHAM: I think I've got 22 [18] seconds.

JUSTICE STEPHEN REINHARDT: No, you're over 22 –

JUSTICE MARSHA BERZON: No.

JUSTICE STEPHEN REINHARDT: – seconds.

MR. ROBERT GRAHAM: Oh, okay.

JUSTICE MILAN SMITH: You're in the trapdoor phase.

MR. ROBERT GRAHAM: Ah, wouldn't be the first time. Thank you for your time.

MR. JEFFERY CLAIR: Good morning, Your Honors.

JUSTICE STEPHEN REINHARDT: Now you – you're saving two minutes for rebuttal?

MR. ROBERT GRAHAM: Yes, please if the – if the Court will allow.

JUSTICE STEPHEN REINHARDT: Okay.

MR. JEFFERY CLAIR: Um, Your Honors, may it please the Court, I'm Jeffrey Clair. I'm now the Justice Department Counsel for the United States as Amicus in this matter.

Uh, if I might start with Judge Smith's question, why are doctors different here? Um, in 1970, Congress made a legislative policy determination that the prospect of, uh, ruinous malpractice judgments and the burdens of having to defend malpractice suits, uh, were deterring [19] doctors for coming to work for the Federal service and impairing the Agency's mission.

So it enacted a statute worded in extraordinarily broad terms that makes the, uh, Federal Tort Claims Act, a, uh, a remedy against the United States, be exclusive of any other civil action –

JUSTICE MILAN SMITH: But – but –

MR. ROBERT GRAHAM: – arising out of –

JUSTICE MILAN SMITH: – but Counsel – and I hate to interrupt you at this early point, but we don't have a lot of time to talk about this.

MR. JEFFERY CLAIR: Yes, sir.

JUSTICE MILAN SMITH: Let – let's just stipulate that as far as malpractice is concerned, that §233, not just (a), but farther on is just replete with references to malpractice.

I mean there's a – you go back and you find §233(f), (g), (i), (k) and (m), among the ones I found, that talk – of §233, that talk about not only how they're going to deal with malpractice, but it gives the secretary the ability not to hire doctors having – who have a particularly high rate of malpractice claims.

It talks about basically arbitrage, whether it makes more sense for the Government to have malpractice insurance versus self-insuring.

[20] So I think we can stipulate that insofar as ordinary medical malpractice claims are concerned, there's no question that that section is designed to make it the exclusive remedy. But that's not what we're talking about here. We're talking about whether or not Bivens survives this analysis.

Now, I – I – I would just like to ask you this: you're familiar with the – the infamous Tuskegee Syphilis tests and – and studies are you not?

MR. JEFFERY CLAIR: I am, Your Honor.

JUSTICE MILAN SMITH: That was carried on by PHS for almost 40 years to determine whether – as it turned out African American men would have certain effects. They would just test them when they're going to die. They didn't give them Penicillin and so on.

Today I think it's fair to say that that would've risen well above a Constitutional level. Is it the Government's position that were the PHS to engage in a Tuskegee Syphilis experiment today that there would be no Constitutional claim against the PHS because of §233(a)?

MR. JEFFERY CLAIR: It is, Your Honor, even for, uh, uh, the most egregious misconduct such as that, so long as those PHS doctors are acting within the scope of their employment.

Congress said – has said that the remedy for any [21] injuries they inflict is solely against the United States pursuant to the Federal Tort Claims Act.

And that – the language that would exclude even the most egregious of Constitutional claims is right in the operative provisions of §233(a) itself. It says with respect to injuries arising out of medical functions performed by a – a – public health service doctors, uh, the Federal Tort Claims Act remedy is exclusive of any civil action and we'd say –

JUSTICE MILAN SMITH: What about this – what about §233(e), which says –

MR. JEFFERY CLAIR: Well, Your Honor, that – if I might – that's, uh, I think illustrates the point that Congress has focused on public health service doctors and enacted a scheme. It is particularly applicable to the problems and policy concerns that are presented by public health service employees alone. And what's –

JUSTICE MILAN SMITH: But –

MR. JEFFERY CLAIR: – important –

JUSTICE MILAN SMITH: – but – but that – but that section, which is part of the same section of the code of which the Government and the Petitioner – or the Appellant relies, deals with doctors.

And it says that assaults and batteries arising out of negligence in performing medical, surgical, dental or [22] related functions is not covered exclusively –

MR. JEFFERY CLAIR: And Your Honor –

JUSTICE MILAN SMITH: – right?

MR. JEFFERY CLAIR: – Your Honor, if I might, what that provision actually does is that it makes public health service doctors – makes – makes claims arising out of their treatment, uh, for a – an – a battery committed by –

JUSTICE MILAN SMITH: Mm-hm.

MR. JEFFERY CLAIR: – providing medical care without informed consent actionable under the Federal Tort Claims Act even though of the Federal Tort Claims Act applied, such claims would be barred by in fact, potential –

JUSTICE MARSHA BERZON: But – but –

MR. JEFFERY CLAIR: – tort exception.

JUSTICE MARSHA BERZON: – that seems me to run in the opposite direction for our problem, because there is no exception for §2679. In other words, when Congress in §233, and I understand that there are time factors here in terms of what happened in what order.

But at the time that the Westfall Act was passed and Congress said, as I read it, for all employees of the Government, the remedy – the – the FTCA remedy is exclusive except not for Bivens actions.

[23] If they wanted to create an express exception of the kind Carlson talks about, to what §233, they – they could have done that. But instead, one reads this, you – first of all you have cross references, but also you have the fact that – that §2679 on its face applies to all Federal employees.

MR. JEFFERY CLAIR: Well, Your Honor, let me take your last statement first. Yes, that is true but for, uh, §233, the Westfall Act provisions would apply to these employees as well and the exception for Bivens claim would apply to Bivens employees as well.

But the – the salient point here is that Congress did enact –

JUSTICE MARSHA BERZON: Exception. I mean one interesting thing is that it's not written as an exception. It's written, as I am reading it, essentially as a construction; paragraph one does not extend or apply to a civil action.

It's not – it doesn't say 'except that it doesn't apply.' It's simply telling you that it doesn't apply and – and in that sense, it seems to me supports the notion that it doesn't apply in §233(a) either, that language doesn't mean this is what they're saying.

MR. JEFFERY CLAIR: Well, Your Honor, I – I – I agree that what it says is that the – the prior [24] section does not apply. But that's consistent with the legislative history of the Westfall Act which shows that Congress intended simply to leave the state of the law as it applied to Constitutional torts, uh, unchanged.

You have those statutes there –

JUSTICE MARSHA BERZON: That's right, but we don't know what the state of the law – I mean –

MR. JEFFERY CLAIR: Well, but Your Honor –

JUSTICE MARSHA BERZON: – it was with regard to §233(a) at that point because nobody had ever construed it with regards to Bivens actions.

MR. JEFFERY CLAIR: Well, Your Honor, there is the plain language of §233(a) which extends to any civil action and certainly that would contemplate an action under the Constitution.

Now, I think much has been made here of the fact that Bivens ran with the – the Bivens case, uh postdates the enactment of the statute. This is a 1970 statute –

JUSTICE MARSHA BERZON: We know that the general – that what §233(a) was about was malpractice cases. And – and what anomaly in the way that you're reading all this is that for Constitutional violations, if you can't – it, it's one thing to say that for a malpractice claim, you come to look to different state laws and people will recover whatever the state law [25] allows.

But the consequence of this aside from who you can sue is also that it – it – if you're – if you have a Constitutional violation in New York or California, you have completely differential ability to recover something approximating your losses, right?

MR. JEFFERY CLAIR: Well it is true that under the Federal Tort Claims Act, local law does –

JUSTICE MARSHA BERZON: That's true –

MR. JEFFERY CLAIR: – the local does –

JUSTICE MARSHA BERZON: – and it makes sense for – for torts that are parallel to start torts. But for torts that aren't parallel to state torts that are Constitutional torts, what sense does it make?

MR. JEFFERY CLAIR: Well, Your Honor, because Congress was concerned simply with insulating doctors from liability, not with the nature of the cause of action, the – the – the sources of law on which the claims were predicated.

JUSTICE MARSHA BERZON: May I –

MR. JEFFERY CLAIR: It was –

JUSTICE MARSHA BERZON: – ask a question about that?

MR. JEFFERY CLAIR: Certainly, Your Honor.

JUSTICE MARSHA BERZON: Did the doctors in [26] fact have any chance of having to pay this?

MR. JEFFERY CLAIR: Um –

JUSTICE MARSHA BERZON: Isn't there an indemnity provision under – under – for Federal law for such that if they are held liable that their expenses of defense and damages will be paid?

MR. JEFFERY CLAIR: Uh, that – there is a law that pertains to indemnity, but it does not say what Your Honor has – has stated the –

JUSTICE MARSHA BERZON: I'm sorry, I can't hear you.

MR. JEFFERY CLAIR: There is an indemnification regulation that applies to these doctors. It is 45 CFR-36. Uh, it provides that in the sole discretion of the Secretary of Health and Human Services, indemnification may be paid, uh, for – or may not be paid. There is simply – there is authority to indemnify the doctors against such a judgment, but there is no compulsion that they do so, applied –

JUSTICE MARSHA BERZON: Are – are the doctors stuck with paying their own lawyers?

MR. JEFFERY CLAIR: Uh, they are at –

JUSTICE MARSHA BERZON: On –

MR. JEFFERY CLAIR: – legal – their legal expenses are reimbursed by the United States, yes. Again, [27] pursuant to discretionary provisions that leave the decision as to whether to afford that indemnification solely to the discretion of the administrative official.

I think, Your Honor, its – its, uh, with respect, inappropriate to suggest that this is really an action against the United States because well of course the action of the United States is going to pay. There is no statute that requires such payment and –

JUSTICE MARSHA BERZON: No, no, I understand –

MR. JEFFERY CLAIR: – and – and –

JUSTICE MARSHA BERZON: – that but in terms of whether – I mean it seems to me that with regard to malpractice, what about with regard to malpractice? Is this does the same indemnity provision apply?

MR. JEFFERY CLAIR: It is the same, yes, ma'am. Uh, and again it is a discretionary determination, the decision as to whether to indemnify lies solely with, uh, uh, a senior managerial personnel within the pertinent administrative –

JUSTICE STEPHEN REINHARDT: Well if you think –

MR. JEFFERY CLAIR: – agency.

JUSTICE STEPHEN REINHARDT: – that Congress is so concerned with seeing the doctors were not, did not [28] have to pay, then the Government can certainly carry out the will of Congress.

MR. JEFFERY CLAIR: Well, uh, Your Honor, I think first and foremost our – our –

JUSTICE STEPHEN REINHARDT: Mm-hm.

MR. JEFFERY CLAIR: – task is to apply the statute here as –

JUSTICE STEPHEN REINHARDT: Mm-hm.

MR. JEFFERY CLAIR: – written. And the statute as written says that all such actions, any civil or – or – any civil action arising out of such medical injuries are excluded.

It draws no distinctions between common law torts and Constitutional torts. It is not concerned with the categories of causes of action, uh, or the sources of substantive law that underlie the cause of action.

JUSTICE STEPHEN REINHARDT: Yeah, I think you were going to make an argument about the

– the – when Bivens was passed was irrelevant? Was that –

MR. JEFFERY CLAIR: Well, yes, Your Honor, I think that the notion is because Bivens wasn't established at the time of –

JUSTICE STEPHEN REINHARDT: Mm-hm.

MR. JEFFERY CLAIR: – Bivens hadn't been decided at the time this statute was enacted in 1970. [29] Somehow Congress couldn't possibly have contemplated excluding Constitutional claims.

And I think I – a wider view of the history of the Bivens remedy, uh, refutes that notion. Uh, first and foremost, cert was granted in Bivens in June of 1970. This statute was enacted in December of 1970, so the question of whether such a damages remedy should be afforded was already before the Supreme Court when the Congress, uh, enacted this statute.

Secondly, the very opening lines of Bivens make clear that it is deciding – in deciding this Constitutional damages remedy question, it is deciding an issue that was expressly left open by the Supreme Court in Dell v. Hood, a case dating back to 1946.

All the substantive law that the Court relies on in Bivens, the Court's power to fashion an appropriate remedy and to look to a damages remedy for claims that are within the Federal Court's jurisdiction, relies on a chain of cases long pre-dating this

statute, uh, starting with Bell v. Hood in 1946 and stretching all the way back to Marbury v. Madison.

Congress had before it, examples of other statutes that provided damages remedies for Constitutional violations. So –

JUSTICE MILAN SMITH: Would the Government [30] agree that – that these statues are not artfully drafted?

MR. JEFFERY CLAIR: Well I – I always find difficulty in, in, in, uh, teasing the meaning out of the statute at first read, uh, at first reading and I think that is true here, but –

JUSTICE MILAN SMITH: They are at best, ambiguous are they not? I mean –

MR. JEFFERY CLAIR: Well I would, Your Honor –

JUSTICE MILAN SMITH: – if –

MR. JEFFERY CLAIR: – I would not agree that §233 is ambiguous with respect to the scope of the exclusivity.

JUSTICE MILAN SMITH: Even – even when you include the remedy section –

MR. JEFFERY CLAIR: Well I – I was –

JUSTICE MILAN SMITH: – as compared to the other sections?

MR. JEFFERY CLAIR: – hoping – I was hoping to come to that – that – the argument – the – the rationale principally relied on by the District Court.

Which is a kind of a double incorporation, uh, by reference argument, the notion is that §233, uh, reference – it incorporates by reference the jurisdictional provision of the Federal Tort Claims Act.

[31] §1346(b), which in turn incorporates by reference, uh, the –

JUSTICE MILAN SMITH: Where else –

MR. JEFFERY CLAIR: – provisions –

JUSTICE MILAN SMITH: – where else do you find a remedy if you don't do that though?

MR. JEFFERY CLAIR: Well you do find a remedy by – because the §233 says – points to the Federal Tort Claims Act and says that is your – your – your exclusive remedy.

But the question of the scope of that exclusivity is resolved right in the operative provisions of §233 itself.

One – one problem we see in the District Court's analysis is that there simply is no language of incorporation by reference. It does not say –

JUSTICE MILAN SMITH: Does – does there have to be?

MR. JEFFERY CLAIR: I – I – to support the District Court's rationale and the arguments advanced by Plaintiff, I think there does have to be.

JUSTICE MILAN SMITH: How – how could the –

JUSTICE MARSHA BERZON: I – I don't understand that – it says –

JUSTICE MILAN SMITH: – Internal Revenue Code even function without – if – if you have to have [32] incorporation by reference, the Internal Revenue Code just dissolves into a mass of kryptonite.

MR. JEFFERY CLAIR: Well, well –

JUSTICE MILAN SMITH: I mean there's one section all over the place. I mean this – this section refers to that section, the other section that you can't even understand it without looking at five or six different sections every time you look.

And this is really no different, is it?

MR. JEFFERY CLAIR: Well I think it is different, Your Honor, because the statute is solely about defining the exclusivity of the Federal Tort Claims Act in this particular context. Why the Court should then proceed to look at a –

JUSTICE MARSHA BERZON: But it – but it's subject –

MR. JEFFERY CLAIR: – provision that –

JUSTICE MARSHA BERZON: – too.

MR. JEFFERY CLAIR: Uh, the – that the jurisdictional provision of the Federal Tort Claims Act is subject to the provisions of Chapter 171, uh, of Title 28.

Eighteen years after the enactment of this statute Congress –

JUSTICE STEPHEN REINHARDT: You know, you just mentioned jurisdiction. I mean the statute begins, [33] §233(a) remedy provided by §1346(b). And as you pointed out the §30 – §1346(b) is a jurisdictional section. It doesn't even provide a remedy.

MR. JEFFERY CLAIR: Well what the –

JUSTICE STEPHEN REINHARDT: So the – so the answer to Judge Smith's question of whether it's ambiguous has to be yes.

MR. JEFFERY CLAIR: Well, Your Honor, we'd again respectfully disagree. Yes, §1346(b) is in part a, uh, a jurisdictional provision, but I – I – we do agree with the Plaintiffs to this extent, that references to §1346(b) and §2672 of Title, uh, 28 are a typical statutory shorthand for referring, uh, to the Federal Tort Claims Act.

I – I think there's no –

JUSTICE STEPHEN REINHARDT: Well I –

MR. JEFFERY CLAIR: – ambiguity –

JUSTICE STEPHEN REINHARDT: – I – there's an easier way to refer –

JUSTICE MARSHA BERZON: So what you –

JUSTICE STEPHEN REINHARDT: – refer to the –

JUSTICE MARSHA BERZON: I'm sorry.

JUSTICE STEPHEN REINHARDT: – refer to the Federal Tort claims Act than to pick out one paragraph that's a jurisdictional provision and say that the remedy [34] provided by that jurisdictional provision. They could've said by the Federal Tort Claims Act. They could've given the – any – any section that provides the remedy.

They could have, you know, given the code citations for the Act.

MR. JEFFERY CLAIR: Well certainly, Your Honor, they could've – Congress could've made –

JUSTICE STEPHEN REINHARDT: Could –

MR. JEFFERY CLAIR: – reference to remedy in some other way.

JUSTICE STEPHEN REINHARDT: Well but they –

MR. JEFFERY CLAIR: But they way that they have shown –

JUSTICE STEPHEN REINHARDT: – didn't really do it this way. It – it – they did it by referring to a section that doesn't in fact provide a remedy.

MR. JEFFERY CLAIR: Well, Your Honor, then I – then I – I would be hard pressed to see how the entire statutory scheme could operate in that – in those circumstances. And I'd have –

JUSTICE MARSHA BERZON: But – but –

JUSTICE STEPHEN REINHARDT: No, you'd have to say –

JUSTICE MARSHA BERZON: – but – but therefore –

[35] JUSTICE STEPHEN REINHARDT: – it's – that's ambiguous and –

JUSTICE MARSHA BERZON: – this is what you –

JUSTICE STEPHEN REINHARDT: – you have to – you –

JUSTICE MARSHA BERZON: – you said there's no incorporation by reference. Well isn't the only way to read this to make any sense is that there is incorporation by reference? That is that the reference to §1346 had to be a reference to the – subject to the provisions of Chapter 171 and essentially to incorporate 171? What else does it need?

The only way you get from the §1346 reference to where we all agree you have to get, including you,

which is to the incorporation of the Federal Tort Claims Act is through – subject to the provisions of the Chapter 171 as its titled, right?

MR. JEFFERY CLAIR: Well again, Your Honor, I'm – I would balk at the notion that there is an incorporation by reference.

The Federal Tort Claims Act was an existing remedy at the time this statute was enacted. What this statute does is to point at that existing remedy and to say for a particular class –

JUSTICE MARSHA BERZON: Well but –

[36] MR. JEFFERY CLAIR: – of conduct, that remedy is exclusive.

JUSTICE MARSHA BERZON: – and what's the difference between that an incorporation by reference? I don't understand it.

MR. JEFFERY CLAIR: Because we're dealing here with the scope of the exclusivity provision, not the provisions that provide the remedy that is made exclusive and the scope of the exclusivity determined simply by the operative provisions of the face of §233.

JUSTICE MARSHA BERZON: What do you understand subsections of the provisions of Chapter 171 of this title to mean?

MR. JEFFERY CLAIR: I mean, uh, I would understand that to mean that the Federal Tort Claims Act remedy, the, the, the various things that

you can recover for under the Federal Tort Claims Act are defined in part by some of the provisions of Chapter – of subchapter –

JUSTICE MARSHA BERZON: It doesn't say that. It says all of them. It says subject to the provisions of Chapter 171 of this title.

MR. JEFFERY CLAIR: Well Your Honor, chapter – Subchapter 171 includes a number of things that are obviously unrelated to that, including a provision directing, uh, reports to be filed by – to Congress –

[37] JUSTICE MARSHA BERZON: Yes, but this one, on its face, does apply. This one on its face applies as we already agree to the answer.

It applies to any employee of the Federal Government.

MR. JEFFERY CLAIR: It does not however, the, uh, alter the scope or – or – the – it does not however author the – the types of things you can be covered for under the Federal Tort Claims Act or the, uh, or the circumstances in – in which you can have a judgment against the United States under the Federal Tort Claims Act.

What §2679 does is it says when you have such a remedy; it discusses when that remedy is exclusive of other remedies. Nothing in §2679 changes what kinds of causes of action you can bring against the Federal Government, what items of damages you can claim, what circumstances the Government will be liable.

It simply has no bearing on any of those things. It – it –

JUSTICE STEPHEN REINHARDT: All right, you're – you're over five minutes over.

MR. JEFFERY CLAIR: Okay, thank you, Your Honor.

JUSTICE STEPHEN REINHARDT: Okay, thank you, [38] Counsel.

MR. CONAL DOYLE: May it please the Court, my name is Conal Doyle and I represent, uh, the Estate of Francisco Castaneda through, uh, his sister, Yanira Castaneda as the personal representative as well as his sole heir, Vanessa Castaneda, his 15-year old daughter.

Uh, they wanted to be here today but, uh, Vanessa is in Arizona and, uh, and, uh, Yanira has childcare responsibilities.

Um, thank you for expediting the briefing on this important case and, uh, expediting the hearing.

Uh, I think that – that everyone here agrees on the issue, uh, that is whether the District Court properly interpreted, uh, 42 USC §233(a) as permitting Plaintiffs to assert Bivens claims because the plain language of that statute, following the statutory trail to the FTCA expressly preserves the right to bring Bivens actions.

JUSTICE MILAN SMITH: Mr. Doyle, the –

JUSTICE MARSHA BERZON: May I ask what –

JUSTICE MILAN SMITH: – the –

JUSTICE MARSHA BERZON: – (unintelligible) hearing may –

JUSTICE MILAN SMITH: – the – the Carlson case has facts that are somewhat similar to this. But there's a troubling comment in Carlson – well I'll just [39] read it briefly, it says, "This conclusion," referring to the FTCA, complements Bivens, "is buttressed by the significant fact that Congress follows the practice of explicitly stating what it – when it means to make FTCA an exclusive remedy."

Then among other statutes, it cites 42 USC §233(a). What implication if any, does that have on you case?

MR. CONAL DOYLE: Your Honor, Carlson set forth a two-part test for determining whether or not a statute could provide exclusivity. The first part of that test is an explicit declaration by Congress that there is a substitute remedy.

The second part of the test, which Judge Reinhardt alluded to in – in argument, was that that, uh, alternative remedy has to be equally effective in the view of Congress.

And this statement in the, uh, Carlson case just recognizes the fact that Carlson – that – that §233(a)

as well as a number of other immunity statutes provide, uh, an exclusive remedy for malpractice by government health personnel. And that's exactly what the language says, "Malpractice by certain government health personnel."

And so as Judge Berzon indicated earlier, um, the issue is – is – is what is the scope of the immunity? I [40] mean we don't disagree that §233(a) provides immunity for malpractice claims, which are different from Constitutional claims.

And so, uh, because the – the Supreme Court chose its words carefully just like this Court does in writing opinions, uh, after going through an analysis of the difference between the FTCA and Bivens claims; going through the four-part test, uh, Judge Smith that you indicated, uh, you talked about earlier, um, finding specifically that – and I'm going to read this, uh, quote out of Carlson, it's on page 23.

"Plainly, FTCA is not a sufficient protector of a citizen's Constitutional Rights and without a clear Congressional mandate, we cannot hold that Congress relegated respondent exclusively to the FTCA remedy."

Now – now §233(a) does exactly that. I mean §233(a) says your alternative remedy is the FTCA. So the Supreme Court in Carlson goes to great lengths to say it, it's not in discussions – in a discussion of Bivens context, then says, well, §233(a) and those other statutes provide that explicit declaration.

If – if they meant to say that it – in an extent of a Bivens claims, they certainly would have said so. They didn't. They carefully said it applies to malpractice by government health personnel.

[41] JUSTICE MILAN SMITH: So you don't view the Court's comment on page 19 that the §233(a) was an example of the kind of explicit statement by Congress that this was intended as a substitute for a Bivens claim.

MR. CONAL DOYLE: Correct. I – I don't –

JUSTICE MILAN SMITH: Any other way that, that the language of the opinion itself that – any other way that you would distinguish that aspect of Carlson that would help your case?

MR. CONAL DOYLE: Uh, you know, I think that you have to – to look at kind of the timeline, sequence of events of cases and I think that helps.

So, you know, this goes out – goes outside the language of Carlson, but if you look at the timeline of events here, um, you talked about the fact that §233(a) was enacted in 1970, Bivens didn't come down until June of 1971, six months after §233(a).

But the other thing that – that no one's talked about – and I just – I just actually realized it yesterday while I was preparing in the airport, in 1970 –

JUSTICE MILAN SMITH: You must have had a lot of time to prepare –

MR. CONAL DOYLE: I – I did. The – the – the – the Supreme Court in Estelle v. Gamble for the first time, recognized an Eighth Amendment, uh, violation [42] for failure to provide medical care to prisoners.

So not only did, a – a Bivens claim not exist in 1970, but there was no cause of action under the Constitution for violation of the Eighth Amendment. And so the Estelle v. Gamble set forth kind of the – the legal test on the merits we have to establish here in this case, that, you know, there was deliberate indifference to a serious medical need.

But that didn't exist back in 1970 so – so there simply is – is no way that you can read §233(a) as satisfying the Carlson test. That – particularly the second part of the test, which requires Congress to determine that there is an alternative – or that the alternative remedy is equally effective.

Because, I mean Bivens didn't exist and neither did the claim that's at issue here today.

JUSTICE MILAN SMITH: Admittedly the Second Circuit's cases are not binding on us, but how do you address Cuoco?

MR. CONAL DOYLE: In a number of different ways. I mean the most obvious is that, uh, Cuoco does not discuss at all, Liability Reform Act of 1988, which effectively amended §233(a) by preserve – by expressly preserving, uh, that there was remedy

and clarifying the law that existed prior to 1988 for one.

[43] Um, the – the facts of that case are very different than are – as well, it – it's a transsexual male to female transsexual, um, case, um, and the – the a couple other things that –

JUSTICE MILAN SMITH: But you're – you're distinguishing on the basis of which type of Constitutional remedy there is or if it rises to a Constitutional level, right?

MR. CONAL DOYLE: You know I – you know I – I don't think that – I don't think that the facts really should have that much effect here. But, but I think that, um, it sometimes color decisions, um, but I don't – I don't – I'm not suggesting that – that that particular Constitutional violation and that case, um, is any different for our purposes here today.

JUSTICE MILAN SMITH: Well didn't the Court there find that – that it – that what happened did not rise to the level of a Constitutional claim in any event?

MR. CONAL DOYLE: You know, I don't know that the Court came to that conclusion. I mean the Court assumed for the purposes of the, um, of the case that there was a serious medical need.

JUSTICE MILAN SMITH: Right.

MR. CONAL DOYLE: And – and – and I don't frankly – the Court may have found that there was no [44] deliberate indifference on that.

But as it pertains to the legal issue that's before us today, the – a couple other things the Court didn't do, which is significant, is it – it never analyzed the four factors, uh, uh, the Carlson set forth and it never even discussed Carlson at all.

And it didn't discuss that two-part test where you have to show the – the – the – the second part of the test that Congress determined that was the other alternative remedial scheme was equally effective, so –

JUSTICE STEPHEN REINHARDT: Well, Counsel, could –

JUSTICE MARSHA BERZON: Could I ask –

JUSTICE STEPHEN REINHARDT: – your opponent said that the answer to that is it found in our case, the Moore case; do you have a response to that? That Moore said that if Congress did the first part and excluded it that meant it found it equally effective.

MR. CONAL DOYLE: You – you know, you know, the Moore case, I haven't read the Moore case, Your Honor.

I – I wrote that down when – when Counsel, uh, uh, cited it, but I'm not familiar with it.

JUSTICE STEPHEN REINHARDT: Okay.

MR. CONAL DOYLE: I think what – I think what – and it – it – I think it was a Ninth Circuit case [45] that – that you referred to, but it doesn't change – it can't change the Supreme Court's –

JUSTICE STEPHEN REINHARDT: No, but it would bind us.

MR. CONAL DOYLE: Well I – I don't – I think that the Supreme Court's test in Carlson is still the – the applicable test the Court has to, um, go through to – to reach the end – the end conclusion here and that being that there is that requirement to find that it's equally effective.

JUSTICE MARSHA BERZON: It's all – I mean it's – it's true I think that the more recent –

MR. CONAL DOYLE: That –

JUSTICE MARSHA BERZON: – that if today, they passed the same provision as §233(a) and we didn't have a complication of – of §2679, you would, I – perhaps is to admit that they made the determination with regard to a Bivens action.

But A, it didn't exist at the time so it seems a little odd to think that they made a determination that's equally effective because they didn't know about it, for both reasons that you suggested it.

So the time sequence seems to fit into that – that pattern as well I think. I – I have a completely different question just to – to be sure I – I understand [46] what we're doing here today.

Is, is there any issue before us now other than this statutory question? In other words, what about looking at the pleadings to determine whether these individuals – whether there's sufficient to allege what you would have to allege at the higher Constitutional standard with regard to each of these individuals? Is – is anybody contesting that? Is that a problem we need to deal with?

MR. CONAL DOYLE: Well I understand that, uh, Mr. Henneford has filed a brief. He was a Health Services Administrator at the San Pedro facility which was – Mr. Castaneda was detained at two separate facilities; the first one was San Diego Correctional Facility from March 27th of 2006 to approximately November 23rd of 2006.

He was then transferred to San Pedro, um, and was there from, uh, November 24th, approximately to February 5th, 2007 when he was released. Mr. Henneford was the Health Services Administrator in that facility – excuse me, in that facility.

He's the only one that's raised, um, before this Court, any issue about whether the factual allegations are sufficient as to him.

JUSTICE MARSHA BERZON: All right, now, what I'm asking you is, is that question; is – with respect to him or anyone else, before us on this qualified – not [47] qualified, but immunity appeal at this point?

MR. CONAL DOYLE: I – I don't think so. I – I mean this is – this is an appeal of absolute immunity that, uh, denial of absolute immunity. The issue that – that Mr. Henneford raised, I believe is one of qualified immunity; that being whether or not the law was clearly established at the time he acted, that what he was doing was unlawful, which goes to the factual allegations of the – of the complaint.

JUSTICE MILAN SMITH: Was that raised at the District Court level?

MR. CONAL DOYLE: It – it – it wasn't, not specifically by – by Mr. Henneford. I mean I – the – the United States, which was representing all these individuals at the time, um, uh, suggested in its brief that, um, the – the claim – medical care provided Mr. Castaneda did not rise to the level of, um, a Constitutional claim. That was very soundly rejected by the District Court.

JUSTICE MILAN SMITH: Now for – for our purposes in following up on what Judge Berzon indicated, normally when something's not raised at the District Court level, it can be waived. Was there anything raised at the District Court level on behalf of Mr. Henneford in terms of qualified immunity or for our purposes to the degree we [48] even have any role in considering that, is it waived?

MR. CONAL DOYLE: It – it is waived. It – it was not preserved below and –

JUSTICE MILAN SMITH: What – how can that be fair to him since at the time that this occurred, he did not have individual counsel but rather was represented by the United States, if you will, the ultimate payor in such a situation; were his interests adequately represented by the United States at that point?

Or is it fair to have this issue waived in terms of qualified immunity if you ever get to that as a – since he didn't have his own counsel at the time?

MR. CONAL DOYLE: Well, uh, uh, I'm not suggesting that it's waived for the entire purposes of this case. He can use the opportunity when, um, if he's still in the case after this appeal to raise qualified immunity down the road in another Motion to Dismiss perhaps or that Rule 56 level.

So he – his qualified immunity – I didn't mean to suggest that his qualified immunity defense was entirely waived for the whole case. I'm just saying that for the purposes of this appeal, it wasn't raised below and – and, you know, it's –

JUSTICE MILAN SMITH: So for your – for your perspective, that's not even before us at this point?

[49] MR. CONAL DOYLE: That's – that's just not – before us.

JUSTICE MILAN SMITH: Okay.

JUSTICE MARSHA BERZON: But, see what's odd about this is, I'm not sure it is only the current issue of qualified immunity of defense because in this instance we have one level of allegation that is excluded – precluded and another level that is not precluded on your theory of the case, right?

So you have to prove – you have to at least allege enough to – to – to make up that increment. And I – I guess the question is whether making up that increment includes demonstrating that he, Henneford and each of the other individuals, had, you know, both – you know, knowledge and was so situated as to someone who needs to meet these standards.

So that's what's really bothering me. I mean is there something more we would need to decide other than how the statute – that the statute – that the Bivens action does potentially survive, but if we have to demonstrate that it actually is to survive under these circumstances.

MR. CONAL DOYLE: Uh, this is – this appeal, uh, from – from our point of view, our understanding, is that it's just – it's just an absolute immunity appeal [50] and – and – and the factual allegations of the complaint aren't at issue.

How – however, I'll address it. Uh, Mr. Henneford received a letter on December 5th of 2006. He was copied on a letter that was sent by Tom Jawetz who is a member of the ACLU National Prison Project. He had been corresponding with Mr. Castaneda for a number of months and had obtained some medical

records from his outside physicians that the Government had sent him to that documented clearly that he needed a biopsy to rule out cancer.

The letter was sent to Henneford as well as – as well as a number of other Defendants on December 5th. Um, letters and follow-up phone calls were made to that facility and he's the Health Services Administrator, the head administrative official for that – at – as it pertains to healthcare for the facility.

Uh, this is all in the – in the, uh, record. Mr. Jawetz has filed a declaration with exhibits. It's in the record as well. And two or three other times, letters were sent from the ACLU, Southern California to the facility informing them of what – what was happening.

Mr. Jawetz's letter, when you review it, will – will demonstrate that he set forth, uh, in detail, Mr. Castaneda's condition, the fact that he had, uh, been [51] diagnosed with potentially having cancer and needed a biopsy as soon as possible; needed to rule out cancer, a deadly disease.

Um, he was detained at that facility until February 5th, 2007 and when he was released, he was never provided the biopsy during the course of his detention, although on January 25th, he'd – they'd sent him to two outside physicians. They sent him to somebody on December 14th, a doctor by the name of Lawrence Greenberg, who said he needed a biopsy to rule out cancer.

They then sent him to another physician to get another opinion Asghar Askari – Dr. Asghar Askari on January 25th, who said he needed a biopsy to rule out cancer.

It was scheduled for February 8th. They released him three days before and the – and the – and – and the, uh, the biopsy appointment was cancelled by the United States Government. So he was – he was never provided this care that was recommended, um, by his physician – the outside physicians that the Government sent him to.

Mr. Henneford was well aware of that. He was in an administrative position where he was responsible for taking care of that. But I clearly believe that if we have to reach that issue at this level –

[52] JUSTICE STEPHEN REINHARDT: Which – which issue? Have to reach which – which issue?

MR. CONAL DOYLE: The issue of whether the complaint states facts sufficient to rise to the level of a Constitutional violation as to Mr. Henneford solely.

So move – moving – moving onto to the – to the District Court's opinion in this case, um, the plain language of the statute clearly controls the Court's analysis here today, and as the Court has noted –

JUSTICE STEPHEN REINHARDT: Well you both seem to think the plain language controls. I'm glad the statute is all that clear to both of you.

MR. CONAL DOYLE: Well, it – on its – on its face, it, it – on §233's face, you – you have to look to the incorporated provisions, so – but when you – when you follow the statutory trail and – and, um, when there's language that says "subject to", the Glickman case it's a Ninth Circuit case that the District Court cited, it's in our briefs that, you know, talked about a – a case where a statute said subject to, uh, §318 of the Department of Interior Appropriations Acts to – to determine the scope of timber sales permitted in another statute.

So this is a – this is a common, uh, statutory construction the Courts do. You always look to – to the [53] incorporated provisions. It would be like I mean, under their analysis, it would be like reading the first three lines of §233(a) but not reading the rest. I mean you have to construe the statute as a whole and you have to follow the trail to where – to where it goes when you do that.

JUSTICE MILAN SMITH: But – but you do agree, do you not that this – these statutes are very poorly drafted and very poorly coordinated?

MR. CONAL DOYLE: I – I would agree that that could've been cleaner, I think. And you could probably say that about a lot of statutes, but –

JUSTICE MILAN SMITH: Maybe all of them.

MR. CONAL DOYLE: Perhaps, yeah. Um, and, and you know to the extent that – I mean we

believe that the language is plain and unambiguous but – but even if it's not, you have to resort to looking at legislative history.

The legislative history in this case is, is equally direct. Um, and I'll – I'll address that briefly.

JUSTICE MILAN SMITH: Is there any – is there any authority or statement or statute of which you are aware, where Congress has indicated clearly as required by Carlson that §233(a) is the exclusive remedy to take the place of a Bivens action?

[54] MR. CONAL DOYLE: There, there's no statute that I'm aware of or that's been cited by any – any party in this case.

JUSTICE MILAN SMITH: Any case law?

MR. CONAL DOYLE: Oh, there – there are the cases, um, starting with Cuoco –

JUSTICE MILAN SMITH: Mm-hm.

MR. CONAL DOYLE: – the 2000 2nd Circuit case –

JUSTICE MILAN SMITH: Right.

MR. CONAL DOYLE: – and its progeny and a number of District Court cases.

JUSTICE MILAN SMITH: But those all follow Cuoco in the Second Circuit, right?

MR. CONAL DOYLE: Right, primarily.

JUSTICE MILAN SMITH: Anything in the Ninth Circuit or any of our District Courts that provide any authority?

MR. CONAL DOYLE: No. I – I mean there is – there – there are some cases that support our position that – that talk about a Bivens claim being viable in the context of §233(a) although they – they don't address specifically the issue of medical care.

Um, in the employment context, the Bivens claim was determined to be, um, uh, viable against a public health [55] service doctor. Um, but there – there's – I'm running out of time.

There's a couple points I want to make sure that I – that I raise in response to some of the arguments raised in – in the brief.

Um, and the brief from – from Mr. Migliaccio – Migliaccio I believe is the way it's pronounced, referenced, uh, or argued that the District Court's reading of – of §2679 rendered §233(a) superfluous as a whole.

And just want to make sure that the Court is aware, because it wasn't in our briefs, that §233 itself has an independent meaning and an independent, um, basis for existing separate and apart from the Federal Tort Claims Act, because it does provide immunity to other classes of employees, um, who otherwise would not be protected by the Federal Tort Claims Act.

And if you look at §233(g), (o) and (p), you'll see that. There's a mechanism set forth in §233(a)(4) deeming an employee – deeming someone whose otherwise not a Government employee – an employee just for the purposes of immunity. Um, it includes – it applies, to I think free health clinics and, and, um, you know administration of small pox vaccine and, uh, uh, health clinics that satisfy a certain standard.

[56] Um, these folks are ordinarily are not – they're not Government employees and they ordinarily wouldn't be provided protection under the FTCA, but for §233(a).

Now §233(g) states that, um, it provides as mechanism by – by deeming the employee to be a – an employee of the Public Health Service Act and then references §233(a).

So the – the – the Court's analysis does not render §233(a) superfluous and Congress in 1988 did not render §233(a) superfluous as a whole, um, by creating this –

JUSTICE MILAN SMITH: Would it be fair to say that Congress, by failing to state anything to the contrary, allowed Bivens actions and the tort – ordinary tort claims approach under §233(a) to proceed on, if you will, a parallel track? They are separate in some respects, but – but clearly divisible types of actions that pertain in this case to medical personnel?

MR. CONAL DOYLE: Yes, and – and you know it's interesting to note that if you look at the – the legislative history of – of – of the Liability Reform Act, it says, you know it's not supposed to change any law that, you know, that happened before that. But there were no cases decided on this issue. There's – none of the cases out there like Cuoco was decided in 2000.

[57] But from 1970 to 1988, there wasn't a single decision that addressed this issue. Uh, and it wasn't until 2000 was – that there was a Circuit Court opinion that addressed this issue at all. So I mean the argument that this – the public policy argument from the Defense – from the Appellants that, uh, this – this would open the floodgate to litigation against these – these – these doctors and they'd be overburdened by litigation, I think is – is mitigated by the fact that there – there were no reported decisions on – on this issue.

JUSTICE MILAN SMITH: What impact if any, does Moore have on our deliberations? The Moore case?

MR. CONAL DOYLE: Uh, uh, again, I – I – I can't address the Moore case.

JUSTICE MILAN SMITH: Oh, that's right, you said you were –

MR. CONAL DOYLE: Yeah.

JUSTICE MILAN SMITH: Okay.

MR. CONAL DOYLE: Yeah, and I – I – well –

JUSTICE MARSHA BERZON: The – the test presumably of whether there would be a floodgate, you know, may be the parallel causes of actions under Estelle and – and in prisons, which, uh, foresee under Carlson and are – are – are not covered by §233.

And I – I – I don't know what the answer is except [58] that I – except that Estelle is a pretty high standard.

MR. CONAL DOYLE: It – it is and – and – you know –

JUSTICE MARSHA BERZON: Do you have – do you have any information on it –

MR. CONAL DOYLE: Well, I –

JUSTICE MARSHA BERZON: – I – I –

MR. CONAL DOYLE: – I could tell you anecdotally for the first six years of my practice, I defended Governmental entities in – in these cases, in these medical neglect cases brought against, um, local Governmental entities; sheriff's offices, the State of Florida.

And, you know, uh, it – probably 90 percent of my cases, maybe 95 percent were – were – were disposed of at – at – at Rule 12, um, and, you know 99 percent of them at Rule 56. I mean, you – I had a handful of

cases and maybe, you know, a 2000-person facility, uh, going on at any one time.

So, I – you know, they're there, the cases come. But I don't think that – that there's – there's a floodgate that will open. And I think that the fact that, um, you know, from 1970 to 1988 there was nothing – there was not a single case and it took 30 years for the first reported Circuit Court case speaks volumes to that.

[59] JUSTICE MILAN SMITH: But that's really not before us right now, right; whether the pleading is sufficient to make out a Bivens claim?

MR. CONAL DOYLE: I – I don't believe so, Your Honor.

JUSTICE MILAN SMITH: So our – our – from your perspective, our role is simply to determine whether in light of the statutory discussions we've had and – and Bivens and Carlson and so on, whether if there is an adequately pleaded and proven Bivens case, it can – it can succeed directly against the individual, Dr. Henneford and others and not be limited exclusively as a claim against the Government; is that correct?

MR. CONAL DOYLE: That – that's – that's correct. Although if you were to reach the issue of the allegation – the – the factual sufficiency of the allegations, and – and in this case, let me just make sure the Court is aware; the facts that have been set

out by the District Court and the facts that are set forth in our brief are not just allegations.

They're – they're the undisputed evidence in the case. Every single fact that's referenced is either – came from a deposition – the deposition of Dr. Hoi the Government employee, or the official Government medical –

JUSTICE MILAN SMITH: But I guess my – my – [60] my point though, Mr. Doyle is that – that the briefs and so on in this case don't really focus on that do they? Aren't we dealing with this other issue?

MR. CONAL DOYLE: Yes, yes, Your Honor.

JUSTICE MILAN SMITH: Okay.

MR. CONAL DOYLE: And before I close, I just wanted to address a couple of the issues that – that have been raised as it relates to the implied repeal and whether or not Constitutional claims are – are cognizable in this context.

And I've pulled the – the brief of the United States, um, in the Smith case, which is – which was, um, talked about in the District Court opinion.

Uh, and, uh, the author of that, one of the authors, Barbara Herwig, who is also one of the authors of this – of the amicus brief filed in this case. The, uh, you know one of the – the – the headings – one of the first headings in the – in the brief, um, states that under the Reform Act, the exclusive remedy for all claims arising from torts committed by

federal employees acting within the scope of their employment except for claims arising from violations of the Constitution or a Federal statute is a suit against the United States under the Federal Tort Claims Act.

And so, you know, the United States has taken the – [61] the position that these claims, uh, these types of claims, Constitutional claims, are accepted in – in all circumstances.

Um, they also in – in the brief on page 16, talked about a conflict between the FTCA and the Gonzalez Act interpreting what are the – you know, the interplay between the Gonzalez Act and the FTCA – excuse me – and indicated that the FTCA would apply, uh, you know, lending credence to the fact that you have to look at – at the FTCA because it applies to – to these statutes under that reference to §1346 and §2672.

The, uh, page 33 to 36 is a discussion about why the, uh, Gonzalez Act does not foreclose the application under this format to this case. And it talks about how the – you have to look at the Federal Tort Claims Act in connection with the Gonzalez Act.

The Gonzalez Act –

JUSTICE MARSHA BERZON: What was the precise issue in Smith?

MR. CONAL DOYLE: The precise issue –

JUSTICE MARSHA BERZON: There is a – yeah.

MR. CONAL DOYLE: The precise issue –

JUSTICE MARSHA BERZON: The precise issue in

Smith?

MR. CONAL DOYLE: – was whether or not, uh, [62] §2680 of the Federal Tort Claims Act which is the Foreign Tort Exception that would apply –

JUSTICE MARSHA BERZON: Right.

MR. CONAL DOYLE: – to – to the – to bar the claim entirely. Um, so the – so the Gonzalez Act suggested there was a remedy against the United – United States under the FTCA but when you go to the FTCA, it bars the claim.

So the Court – the Supreme Court found that there was no – uh, the ultimate holding was that there was no claim, uh, against a – a physician because of the Foreign Tort Exception.

But the point I wanted to make was – is this – is that, um, in Footnote 21, the last, uh, uh, right before the conclusion in their brief, they say whether or not that impression was correct, there is no doubt Congress intended physicians to receive the same protection as other employees.

And that's really, you know, the crux of the issue here in this case is – is do these physicians get special treatment under the Bivens context? And, and you know if you – whether you follow the statutory trail as the District Court did from §233(a) and – to the plain language of §2679 or – or Judge Berzon, as you suggested, whether you just look at – at the Federal Tort Claims Act [63] and §2679 and see that it applies to all Federal employees except for Bivens actions, you have to come to the same conclusion; that being that the plain language, uh, and – and Congress's intent is – is not to preempt or preclude Bivens actions against Public Health Service doctors.

If – if the panel doesn't have any other questions, those are all the comments that I have.

JUSTICE STEPHEN REINHARDT: Thank you, Counsel.

JUSTICE MILAN SMITH: The Government doesn't have any time left.

JUSTICE STEPHEN REINHARDT: Yeah, no, they saved –

MR. ROBERT GRAHAM: I'll be – I'll be very brief, Your Honors.

JUSTICE STEPHEN REINHARDT: If it's over that, we'll probably be okay.

MR. JEFFERY CLAIR: Okay, Your Honors, I did want to address, first Judge Berzon's question about whether there is a question before the Court of

whether these – the complaint states a claim in the first instance, uh, for purposes of a qualified immunity test.

Uh, in the –

JUSTICE MARSHA BERZON: And this is what I asked. It wasn't for purposes of the qualified immunity [64] test. It was for purposes of – of a – of the difference between the exclusivity and a Bivens action if there is a Bivens action.

In other words, whether – whether or not one has to demonstrate what – one the issue is before us is whether the allegations are sufficient to make up that increment so that this is – have these facially a Bivens action and not a malpractice action.

MR. JEFFERY CLAIR: Uh, I see, uh –

JUSTICE MARSHA BERZON: Isn't that – I mean isn't that at least conceptually part of our problem, is has it been waived, which it may have been?

MR. JEFFERY CLAIR: I – Your Honor, I think the only question that was litigated below and presented here is the scope of §233(a).

JUSTICE MARSHA BERZON: Okay, all right, well that – so you're agreeing that – with – with the Plaintiff's lawyer that – that there is no other issue?

MR. JEFFERY CLAIR: Not before the Court. Uh, we would not think that it is waived – the United States, uh, took the position –

JUSTICE MARSHA BERZON: Well it's not that its waived, but it hasn't been litigated on – on this – on the immunity appeal at this point?

MR. JEFFERY CLAIR: That's correct. That's [65] correct, Your Honor.

Um, with respect to the – the, uh, the Westfall Act and whether it was intended to exclude Constitutional torts for these employees as well, um, I wanted to refer the Court briefly to some legislative history. These are the hearings that, um, the Plaintiff has cited and relied on and I'm – I'm going to quote briefly from page 40, which is a colloquy between, uh, Chairman – the Chairman of the Committee, that held these hearings, Barney Frank and another Congressman, who was testifying.

Uh, and he says, "One issue I would like to make – "

JUSTICE MILAN SMITH: What's the date of these hearings?

MR. JEFFERY CLAIR: Um, they're – they are just prior to the Westfall Act, 19 – uh – 88 I believe, April '88, Your Honor. Um, "One issue I should make public here and I want to let everyone know that this is one of the things that we're going to be concerned about.

"There is a separate and much more controversial issue it seems to me about the whole issue of Constitutional torts. And there have been decisions – decisions which allow suits against employees where there is an allegation that an intentional act was committed that diminished someone's Constitutional rights.

[66] It is my intention to see that we get legislation here which does not impinge on that controversy. And I think all sides agree that we do not want to do anything in this issue. We want to preserve the rights of Federal employees and I think it is possible for us to do it in a way that will not impinge one way or the other on that controversy."

Now, that's –

JUSTICE MILAN SMITH: That doesn't – that doesn't help you, does it?

MR. JEFFERY CLAIR: Well it suggests, Your Honor, that the Westfall Act as I – I – I indicated earlier was simply to leave the state of the law as it pertained to Constitutional torts unchanged. So –

JUSTICE MILAN SMITH: Right, so if –

MR. JEFFERY CLAIR: – therefore, it would be what –

JUSTICE MILAN SMITH: – if – if – if Bivens – if Bivens Act claims survive a §233(a) analysis, which I know you dispute, then they would not have been affected by the Westfall Act.

MR. JEFFERY CLAIR: I believe that's correct –

JUSTICE MILAN SMITH: Okay.

MR. JEFFERY CLAIR: – yes, sir, Your Honor, [67] but I've – there is the rub of course, that our position is that –

JUSTICE MILAN SMITH: I understand.

MR. JEFFERY CLAIR: – in §233 doesn't –

JUSTICE MARSHA BERZON: Do you want to briefly address Smith before you sit down?

MR. JEFFERY CLAIR: Yes, Your Honor. Um, there were no Bivens claims at issue in Smith – Smith. Smith was an action brought by a Plaintiff who had, uh, been injured by a –

JUSTICE MARSHA BERZON: But it does – it does have to do with what – the – the – the – the language that I view as incorporating and you view as not incorporating means.

In other words, it – it – it – it essentially says that what was in the context of the Gonzalez Act, that the – that as I understand it that the employees there were subject – that – that the immunity that they were given was the entire immunity of the court claimed – claim – Tort Claims Act would have positively enabled it in both directions.

MR. JEFFERY CLAIR: Well, Your Honor, I'm – I'd – I'd respectfully disagree for this reason.

What the Court held in Smith was that the immunity statute in question there, the Gonzalez Act simply didn't apply in [68] the first instance to the type of claim that Plaintiff brought.

And that therefore, there was no – no issue of coordinating a Gonzalez Act and – and the subsequently enacted Bivens Act, uh, because the – the immunity act simply didn't extend that protection to the Plaintiff in the first instance.

That is why in that case, the Court said the presumption against, uh, implied appeals, the appeals, simply had no application because it didn't affect the rights –

JUSTICE MARSHA BERZON: But that's subsection (b), whether you say then there's extra – setting aside a different argument that the Liability Reform Act was meant to apply solely to those Government employees not already protected from liability by preexisting Federal Immunity Statute.

Isn't – isn't that a – a somewhat parallel question?

MR. JEFFERY CLAIR: Well I – I think it's similar, but it – I – subject to the same answer. I think Plaintiff's argument is a slight variant of the – the argument. I alluded to previously was –

JUSTICE MARSHA BERZON: I'm not hearing it.

MR. JEFFERY CLAIR: The Plaintiff made an [69] argument that is a slight variant of the argument I alluded to previously, which was that Congress had in effect carved out a sphere of influence for these employees in the Gonzalez Act.

And it was because of that sphere that the Gonzalez Act controlled even if it didn't provide any specific substantive protection with respect to the claim at issue –

JUSTICE STEPHEN REINHARDT: Now we've –

MR. JEFFERY CLAIR: – and the Court –

JUSTICE STEPHEN REINHARDT: – We've gone over double your rebuttal time so –

MR. JEFFERY CLAIR: Okay, well thank you, Your Honor. I appreciate the opportunity –

JUSTICE STEPHEN REINHARDT: Okay.

MR. JEFFERY CLAIR: – to appear as I have.

JUSTICE STEPHEN REINHARDT: Thank you. Thank you, all of you Counsel, the Case just reviewed will be submitted. The Court will stand in recess for the day.

[THEREUPON, the hearing was concluded.]

REPLY BRIEF

Supreme Court, U.S.
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No. 08-1529

IN THE

Supreme Court of the United States

EUGENE MIGLIACCIO, ET AL.,
Petitioners,

v.

YANIRA CASTANEDA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY

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PETITIONERS' REPLY

The Ninth Circuit held that 42 U.S.C. § 233(a) does not provide Public Health Service ("PHS") personnel with immunity from *Bivens* claims arising out of the provision of medical care. That decision warrants review and reversal because it directly conflicts with the Second Circuit's decision in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), and decisions of every other circuit court to have addressed the Question Presented, *see, e.g.*, 08-1529 Pet. 5-6 n.3 (collecting cases); is contrary to the plain language of § 233(a) and the Court's interpretation of that language in *Carlson v. Green*, 446 U.S. 14, 20 (1980); misapplies *Carlson*'s test for preemption of *Bivens* remedies; and, finally, raises an important and recurring issue that, because of the nature of the PHS, specially calls for a uniform national rule. If permitted to stand, the decision below will threaten the effectiveness of PHS personnel and their willingness to serve and thereby undermine PHS's ability to fulfill its critical statutory mandate.

Respondents argue that the petition should be denied because the circuit split created by the decision below is too shallow and inconsequential to warrant review. They also argue that the decision below correctly applies *Carlson*, is consistent with the Court's jurisprudence, and properly construed § 233(a). None of these assertions is correct, and none undermines the need for review.

A. The decision below conflicts with *Carlson* and other decisions of this Court

1. Respondents mischaracterize (23-24) *Carlson*'s interpretation of § 233(a) and related statutes. 446 U.S. at 20. *Carlson* expressly contrasts the then-prevailing version of the Federal Tort Claims Act ("FTCA"), which left *Bivens* claims available, with other statutory provisions, which did not. In particular, *Carlson* states that a *Bivens* remedy is unavailable where "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson*, 446 U.S. at 20. Examining the FTCA, the Court observes that it does not contain an "explicit congressional declaration . . . to preempt a *Bivens* remedy." *Carlson*, therefore, takes the next logical step and concludes that, "[i]n the absence of a contrary expression from Congress," an FTCA and *Bivens* actions may be brought simultaneously for the same alleged wrongdoing. *Id.* Immediately thereafter, the majority expressly "buttressed" this conclusion by citing the PHS Act and the Gonzales Act as examples of where Congress "follow[ed] the practice of explicitly stating when it means to make FTCA an exclusive remedy." *Id.*

The unmistakable meaning of this statement in *Carlson* is that PHS Act immunity precludes *Bivens* relief. *Id.* at 19-20. Moreover, an "exclusive remedy" necessarily precludes all other remedies absent an express congressional exception. This is how *Carlson* used the term "exclusive." *Id.* at 23 ("without a clear congressional mandate, we cannot hold that Congress relegated respondent exclusively to the FTCA

remedy"), 27 (Powell, J., concurring) ("Congress possesses the power to enact adequate alternative remedies that would be exclusive"), 30-31 (Burger, C.J., dissenting) (discussing whether Civil Rights Act of 1964 provides "exclusive remedy" or permits parallel *Bivens* claims).

2. Respondents' reliance (29-31) on *United States v. Smith*, 499 U.S. 160 (1991), is misplaced. *Smith* neither states nor implies that the Westfall Act's exception to its general grant of immunity for *Bivens* claims applies to federal employees whose conduct is covered by a separate, preexisting grant of immunity. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4564. The absence of any such statement is not surprising, as the text of 28 U.S.C. § 2679(b)(2)(A) makes clear that it is the general immunity newly conferred by the Westfall Act itself—and only that immunity—that does not extend to *Bivens* claims.

Smith rejected the sweeping argument that "the Liability Reform Act was meant to apply solely to those Government employees not already protected from tort liability in some fashion by a pre-existing federal immunity statute." *Smith*, 499 U.S. at 172-73. That limited statement was predicated on the Court's assumption in *Smith* that 10 U.S.C. § 1089(f) did not provide immunity for malpractice committed abroad. *Id.* at 171-172. In that context the Court properly noted that personnel otherwise covered by the Gonzalez Act could still "benefit from the more generous immunity available under the" Westfall Act. *Id.* at 173. But that in no way supports respondents' contention that the Westfall Act strips previ-

ously protected government personnel of immunity they enjoy under § 233(a)'s separate grant of absolute immunity. Indeed, holding otherwise would contradict *Smith*'s recognition that "[w]hen Congress want[s] to limit the scope of immunity . . . it d[oes] so expressly." *Id.*

3. The FTCA and PHS Act immunities are overlapping but not co-extensive. *See also* Gov't Br. 14 (PHS Act provides "distinct (and more expansive) personal immunity" than general grant of immunity provided by FTCA). In other words, the FTCA affords all federal employees (including PHS personnel) immunity from any civil damage action, except for constitutional torts, arising out of the performance of any act within the scope of their employment. 28 U.S.C. § 2679. In contrast, the PHS Act affords immunity from any and all damage actions arising from the performance of specific acts in the course of employment. 42 U.S.C. § 233(a). PHS Act immunity therefore extends beyond FTCA immunity to preclude *Bivens* claims against a subcategory of federal employees for a specific subset of duties—*i.e.*, medical and related functions—within the scope of their employment.

B. The circuit split alone justifies review

1. Respondents admit (32-33) that the decision below directly conflicts with the Second Circuit's decision in *Cuoco*, 222 F.3d 99, as to both its holding and its reading of *Carlson*. They try to minimize the split by characterizing it (32) as "shallow and unreasoned," but neither is correct.

Respondents brush off (32) decisions of the Third, Fourth, Fifth and Sixth Circuits and numerous dis-

trict court cases simply because they are unpublished. Published or not, there is a regular flow of these cases, and they raise a question of federal law that effects an agency with important responsibilities. The fact that many of them are unpublished is a reflection of how utterly uncontroversial the *Cuoco* decision is and makes the decision below all the more suspect.

Cuoco is well reasoned. It squarely addressed the Question Presented, construed the text of § 233(a), considered its legislative purpose, and correctly applied *Carlson* to reach its holding that § 233(a) bars *Bivens* actions against PHS personnel. 222 F.3d at 108-09. *Cuoco* also specifically rejected the argument that the Ninth Circuit accepted below—"that § 233(a) provides immunity only from medical malpractice claims"—finding that "there is nothing in the language of § 233(a) to support that conclusion." *Id.* at 108.

2. In the face of an undeniable circuit split, respondents' claim (32) that the "Court would benefit from the views of other appellate courts" and "[f]urther percolation" rings hollow because numerous circuits have had occasion to confront the Question Presented and the Ninth Circuit has placed itself in conflict with all of them. Moreover, the conflict between the Second and Ninth Circuits—even if it were the only relevant one for purposes of review on certiorari—is not going to resolve itself through "further percolation." *Cuoco* has stood firm for nearly a decade, and there is no reason to assume the Second Circuit will abandon it.

C. The Question Presented warrants review

1. Respondents mistakenly contend (34-35) that "only" PHS personnel serving in Bureau of Prison ("BOP") or Department of Homeland Security ("DHS") facilities are affected by the decision below. Respondents' statistic that 17% of PHS officers serve in such facilities is a significant number in and of itself, which cuts for rather than against certiorari. Given that PHS's Commissioned Corps is a uniformed service, all of its officers are affected because any of them might be assigned to BOP or DHS facilities as part of normal rotation practices. Respondents' statistic also fails to take into account PHS's civilian employees, who represent a significant percentage of its personnel who provide patient care.

2. Respondents erroneously equate (36-37) the possibility of a government-paid defense and indemnification for *Bivens* liability with the guarantee of absolute immunity. But neither representation nor indemnification is a forgone conclusion. Both determinations are purely discretionary and indemnification decisions are not made, "absent exceptional circumstances," until after there is an adverse judgment against a federal employee. 28 C.F.R. § 50.15; 45 C.F.R. §§ 36.1(a), (c). Absolute immunity is not just a protection from eventual liability, but rather an immunity from suit. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) ("[t]he basic thrust of the [official]-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery'") (quoting *Siegert v. Gilley*, 500 U. S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (official immunity is "an entitlement not to stand

trial or face the other burdens of litigation"). The injury of having to endure years of stressful, distracting, burdensome, and time-consuming litigation is not cured by the uncertain prospect of a government-paid defense or indemnification.

Conclusion

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Nos. 08-1529 and 08-1547

In the Supreme Court of the United States

EUGENE MIGLIACCIO, ET AL., PETITIONERS

v.

YANIRA CASTANEDA, ET AL.

CHRIS HENNEFORD, PETITIONER

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether 42 U.S.C. 233(a), which provides that a suit against the United States under the Federal Tort Claims Act is exclusive of any other action against a commissioned officer or employee of the Public Health Service for injury resulting from the performance of medical functions, bars a suit against such an officer or employee based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(a)

Counsel of record received timely notice of the United States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the United States to file this brief.

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YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The court of appeals held that 42 U.S.C. 233(a)—which makes an action against the United States under the Federal Tort Claims Act (FTCA) the exclusive remedy for all damage claims arising out of medical care provided by commissioned officers or employees of the federal Public Health Service (PHS) while acting within the scope of their employment—does not bar tort claims premised on *Bivens*

v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The government has a significant interest in proper resolution of that issue. The government raises Section 233(a) as a bar to suit against individual PHS personnel when they are sued for conduct arising out of medical treatment. Further, the court of appeals' decision will likely have an adverse impact on the government's ability to recruit, hire, and retain medical personnel for the PHS, and may affect other federal entities that have medical missions covered by similar immunity statutes.

STATEMENT

1. The PHS, which is part of the Department of Health and Human Services (HHS), see 42 U.S.C. 201 *et seq.*, employs, among others, over 6,000 commissioned officers as physicians, dentists, nurses, pharmacists, and other medical personnel, and nearly 14,000 civilian employees whose duties involve patient care. PHS personnel are detailed to a number of agencies, including the Department of Homeland Security, Bureau of Prisons, Indian Health Service, and United States Marshals Service. They provide medical care in every State and in numerous foreign countries—often in communities most in need of medical care providers. PHS personnel also staff quarantine stations to limit the introduction of communicable diseases into the United States and to prevent their spread. See 42 U.S.C. 264; 42 C.F.R. 71.32, 71.33.

PHS's Commissioned Corps is one of the seven uniformed services of the United States. 42 U.S.C. 201(p), 204, 207. The Commissioned Corps, which includes the Surgeon General, may be called into military service in times of war or national emergency, at which point its personnel

become subject to the Uniform Code of Military Justice. 42 U.S.C. 217.[1]

2. a. Following a December 2005 conviction, Francisco Castaneda, an alien, was imprisoned by the California Department of Corrections (DOC). During that incarceration, Castaneda met several times with DOC medical personnel regarding a lesion on his penis. Although those personnel recommended a biopsy, Castaneda did not receive one. Pet. App. 2a-3a.[2]

On March 27, 2006, Castaneda was transferred from DOC to Immigration and Customs Enforcement (ICE) custody in San Diego in connection with removal proceedings that had been commenced against him. According to the complaint filed in district court, Castaneda immediately complained to medical staff—consisting of PHS personnel—that a lesion on his penis was growing, becoming painful, and producing a discharge. He was examined by a physician's assistant, who noted both Castaneda's personal history of genital warts and his family history of cancer, and recommended a urology consultation and a biopsy. Although that recommendation was approved, Castaneda did not receive a biopsy. Over the ensuing months, he repeatedly complained that his condition was worsening. He was seen by several different doctors (including urologists) and physician's assistants, some of whom were concerned about the possibility of cancer and recommended a biopsy.

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[1] The Secretary of HHS may also activate the National Disaster Medical System (NDMS) to provide health services to victims of a public-health emergency. 42 U.S.C. 300hh-11(a). The Secretary may appoint individuals to serve as intermittent NDMS personnel; such individuals are considered PHS employees for purposes of 42 U.S.C. 233(a). 42 U.S.C. 300hh-11(c).

[2] All citations to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 08-1529.

Others considered the problem to be genital warts. Pet. App. 3a-7a, 42a-48a.

In January 2007, Castaneda saw another urologist, who concluded that the lesion was "most likely penile cancer" and ordered a biopsy. On February 5, 2007, before the scheduled biopsy, Castaneda was released from ICE custody. Three days later, he went to a hospital and was diagnosed with penile cancer. A week after that, his penis was amputated, and he began undergoing chemotherapy for the metastasized cancer. He died in February 2008. Pet. App. 7a-8a.

b. Castaneda commenced this action months before his death.[3] He asserted claims against the United States under the FTCA, against state officers and employees under 42 U.S.C. 1983, and against various federal officers and employees of the PHS under *Bivens*. Castaneda alleged that the individual federal defendants violated the Fifth and Eighth Amendments of the Constitution by failing to treat his known serious medical condition, purposefully denying treatment, and acting with deliberate indifference to his serious health needs. Pet. App. 8a.

At all relevant times, the individual federal defendants (petitioners in this Court) were either commissioned officers or civilian employees of the PHS. After certifying that petitioners had acted within the scope of their employment, the government, which then represented petitioners, moved to dismiss the claims against petitioners on the basis of 42 U.S.C. 233(a). Pet. App. 8a-9a. Section 233(a) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the Federal Tort Claims Act] * * * for damage for personal injury, in-

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[3] The representative and heirs of Castaneda's estate have been substituted as plaintiffs. Pet. App. 8a.

> cluding death, resulting from the performance of medical, surgical, dental, or related functions * * * by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. 233(a).

The district court denied petitioners' motion to dismiss. Pet. App. 41a-80a. The court concluded, *inter alia*, that Section 233(a), via its reference to 28 U.S.C. 1346(b) and an ensuing "statutory trail" that the court believed led to Section 2679(b)(2)(A), "incorporates the provision of the FTCA which *explicitly* preserves a plaintiff's right to bring a *Bivens* action." *Id.* at 59a, 61a.

c. The government, on behalf of petitioners, filed an interlocutory appeal. The government also admitted liability on plaintiff's FTCA claim against the United States for medical negligence. Gov't Notice of Admission, CV 07-7241 Docket entry No. 110 (C.D. Cal. Apr. 24, 2008). Shortly thereafter, and before appellate briefing, the government authorized each petitioner to retain private counsel for representation throughout the remainder of the litigation to ensure that each received independent legal advice and that their personal interests were separately considered and represented in the case. Private counsel took over briefing in the court of appeals, and the United States (which remained a party in the underlying district court case) filed an amicus curiae brief in support of petitioners.

The court of appeals affirmed. Pet. App. 1a-40a. The court focused its analysis on *Carlson* v. *Green*, 446 U.S. 14 (1980), in which the Court had held that the availability of an FTCA remedy did not preclude a *Bivens* action against

federal officials. According to the court of appeals, a *Bivens* action is available under *Carlson* unless (1) an alternative remedy is both (a) "explicitly declared to be a substitute" for a *Bivens* remedy and (b) "viewed as equally effective," or (2) there are "special factors" that militate against a *Bivens* remedy. Pet. App. 10a. Applying that test, the court of appeals held that Section 233(a) did not preclude a *Bivens* claim—a result that it acknowledged "conflicts with" the Second Circuit's decision in *Cuoco* v. *Moritsugu*, 222 F.3d 99 (2000). Pet. App. 35a; see *id.* at 10a-40a.

The court of appeals determined that the FTCA remedy offered by Section 233(a) was not "equally effective" as a *Bivens* remedy for the same reasons an FTCA remedy was not deemed equally effective in *Carlson*: (1) FTCA damages, unlike *Bivens* damages, are not awarded against individual defendants; (2) punitive damages are unavailable under the FTCA; (3) FTCA cases, unlike *Bivens* claims, are not tried before a jury; and (4) FTCA remedies are not governed by uniform nationwide rules. Pet. App. 13a-18a.

The court of appeals also determined that Congress did not "explicitly declare" in Section 233(a) that the FTCA was a substitute for a *Bivens* action. The court pointed out that Section 233(a) does not mention constitutional claims and that it was enacted before *Bivens* was decided. According to the court, Section 233(a) was intended only to preempt a particular set of common-law tort claims related to medical malpractice. The court also noted that other federal medical personnel are not afforded comparable immunity from constitutional claims. Pet. App. 18a-35a.

The court of appeals expressly disagreed with the Second Circuit's conflicting decision in *Cuoco*. The court stated that the Second Circuit misread language in *Carlson* that appeared to confirm that Section 233(a) made the FTCA an exclusive remedy. Further, the court argued that the Sec-

ond Circuit failed to address the prong of *Carlson*'s analysis stating that an alternative statutory remedy must be "equally effective" to a *Bivens* action. Pet. App. 35a-37a.

Finally, the court of appeals held that there were no "special factors" warranting hesitation in creating a cause of action under *Bivens* in this setting. In the court's view, Section 233(a) does not provide a comprehensive remedial scheme precluding *Bivens* relief. Pet. App. 37a-39a.

DISCUSSION

The Court should grant review of the court of appeals' decision holding that 42 U.S.C. 233(a) does not provide PHS personnel with immunity from *Bivens* claims arising out of the provision of medical care. First, that decision directly conflicts with the Second Circuit's decision in *Cuoco* v. *Moritsugu*, 222 F.3d 99 (2000). Second, the scope of Section 233(a)'s grant of immunity presents an important federal question because the court of appeals' ruling may undermine the ability of PHS to fulfill its statutory mandate and may affect the interpretation of immunity provisions governing other federal medical personnel. Third, the court of appeals' decision is contrary to the plain language of Section 233(a) and the Court's interpretation of that language in *Carlson* v. *Green*, 446 U.S. 14 (1980).

A. The Courts Of Appeals Disagree On Whether Section 233(a)'s Grant Of Immunity Covers *Bivens* Claims

As the court of appeals acknowledged (Pet. App. 35a-37a), its decision directly conflicts with the Second Circuit's decision in *Cuoco*. In *Cuoco*, the Second Circuit held that Section 233(a) barred a *Bivens* action brought against individual PHS physicians and other employees working at a federal prison facility for inadequate medical care that allegedly rose to the level of an Eighth Amendment violation. The Second Circuit specifically rejected the plaintiff's argu-

ment "that § 233(a) provides immunity only from medical malpractice claims," because "there is nothing in the language of § 233(a) to support that conclusion." *Cuoco*, 222 F.3d at 108. The Second Circuit thus held that PHS employees are absolutely immune from suits arising out of medical treatment, including suits claiming that such treatment violated federal constitutional norms. *Id.* at 107-109.

A number of other courts of appeals have reached the same conclusion as *Cuoco* in unpublished decisions. See *Anderson* v. *BOP*, 176 Fed. Appx. 242, 243 (3d Cir.) (per curiam), cert. denied, 547 U.S. 1212 (2006); *Butler* v. *Shearin*, 279 Fed. Appx. 274, 275 (4th Cir. 2008) (per curiam), aff'g No. 04-2496, 2006 WL 6083567, at *7 (D. Md. Aug. 29, 2006); *Cook* v. *Blair*, 82 Fed. Appx. 790, 791 (4th Cir. 2003), aff'g No. 02-609, 2003 WL 23857310, at *2 (E.D.N.C. Mar. 21, 2003); *Montoya-Ortiz* v. *Brown*, 154 Fed. Appx. 437, 439 (5th Cir. 2005) (per curiam); *Schrader* v. *Sandoval*, No. 98-51036, 1999 WL 1235234, at *2 (5th Cir. Nov. 23, 1999); *Walls* v. *Holland*, No. 98-6506, 1999 WL 993765, at *2 (6th Cir. Oct. 18, 1999); *Beverly* v. *Gluch*, No. 89-1915, 1990 WL 67888, at *1 (6th Cir. May 23, 1990). Indeed, even the Ninth Circuit had previously so held in unpublished decisions. See *Miles* v. *Daniels*, 231 Fed. Appx. 591, 591-592 (2007); *Zanzucchi* v. *Wynberg*, No. 90-15381, 1991 WL 83937, at *2 (May 21, 1991).[4]

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[4] In addition, all but two of the district court decisions of which the government is aware agree with the Second Circuit's conclusion. See, *e.g.*, *Brown* v. *McElroy*, 160 F. Supp. 2d 699, 703 (S.D.N.Y. 2001); *Teresa T.* v. *Ragaglia*, 154 F. Supp. 2d 290, 299 (D. Conn. 2001); *Seminario Navarrete* v. *Vanyur*, 110 F. Supp. 2d 605 (N.D. Ohio 2000); *Lewis* v. *Sauvey*, 708 F. Supp. 167, 168-169 (E.D. Mich. 1989); see also 08-1529 Pet. 6-7 n.4 (collecting unpublished district court decisions); but see *Vinzant* v. *United States*, No. CV 07-00024, 2008 WL 4414630, at * 4 n.3 (C.D. Cal. Sept. 24, 2008) (unpublished); *McMullen* v. *Herschberger*,

The Court should grant the certiorari petitions to resolve the conflict between the Ninth Circuit's decision in this case and the decisions of the Second Circuit and other courts of appeals.

B. The Scope Of Section 233(a)'s Immunity Presents An Important Federal Question

The Court's review is further warranted because PHS conducts nationwide operations that should be subject to uniform immunity rules. The immunity conferred by Section 233(a) is of material importance to PHS's personnel and operations. As a result of the decision below, PHS medical personnel serving in or deployed to the Ninth Circuit will be denied protection from suit that their colleagues in other parts of the country are afforded. That disparity will cause significant administrative problems, hindering the efforts of the government to recruit physicians and other medical providers to work in a large geographic region that relies heavily on PHS personnel to deliver health care services. The court of appeals' decision, if left standing, could force HHS to indemnify PHS personnel for the costs of defending or resolving *Bivens* claims arising out of performance of their medical duties—a potentially significant drain on limited agency resources. In addition, that court's decision would affect the immunity provided to medical personnel beyond the PHS, because 42 U.S.C. 233(g)-(n) confers on employees, officers, and certain individual contractors of federally funded community health centers the same immunity afforded PHS commissioned officers and employees. The court of appeals' interpretation of the scope of Section 233(a) therefore will create similar problems for the government in supporting these health centers.

No. 91-CIV-3235, 1993 WL 6219 (S.D.N.Y. Jan. 7, 1993) (unpublished; superseded by *Cuoco*).

The Ninth Circuit's interpretation of Section 233(a) also may have implications for medical personnel in other agencies who operate under immunity provisions using similar language. See 38 U.S.C. 7316(a) (making the FTCA the exclusive remedy "for damages * * * allegedly arising from malpractice or negligence of a health care employee" of the Department of Veterans Affairs); 10 U.S.C. 1089(a) (making the FTCA the exclusive remedy "for damages * * * caused by the negligent or wrongful act or omission of any [medical personnel]" in the armed services). Indeed, in *Carlson*, this Court discussed the immunity provisions in 38 U.S.C. 7316(a) (formerly codified as 38 U.S. 4116(a) (1988)), 10 U.S.C. 1089(a), and Section 233(a) in a single breath—all as statutes "explicitly stating when [Congress] means to make FTCA an exclusive remedy." 446 U.S. at 20; see p. 18, *infra*.

C. The Ninth Circuit Erred In Holding That Section 233(a) Does Not Bar *Bivens* Claims Against PHS Personnel Based On Medical Treatment

1. a. The court of appeal's holding is contrary to the plain language of Section 233(a). Section 233(a) states:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the FTCA] * * * for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions * * * by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. 233(a).

The text unequivocally provides that the "remedy against the United States" under the FTCA for "damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions" "by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment" "*shall be exclusive of any other civil action or proceeding*" arising out of the same subject matter. 42 U.S.C. 233(a) (emphasis added). The statute draws no distinction between "other civil action[s]" predicated on common-law tort theories and those based on the Constitution. It instead makes plain that the "exclusive" remedy for injuries resulting from medical treatment provided by PHS personnel is an action against the United States under the FTCA. The statute's text could not be clearer: it reflects Congress's intent to afford PHS officers and employees absolute immunity from "any" damages actions arising out of medical care provided in the course of their employment.

The limited legislative history concerning Section 233(a) confirms that statutory purpose. The overarching objective of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868 (of which Section 233(a) was a part) was to facilitate PHS's provision of medical care in underserved areas. See § 2, 84 Stat. 1868; H.R. Rep. No. 1662, 91st Cong., 2d Sess. 1 (1970). Because PHS personnel were not paid enough to afford malpractice insurance, the Surgeon General requested an amendment—Section 233(a)—to protect employees from damage suits arising out of the medical care they provided. See, *e.g.*, 116 Cong. Rec. 42,543 (1970) (Rep. Staggers, the sponsor in the House of Representatives) (PHS physicians "cannot afford to take out the customary liability insurance as most doctors do," "because of the low pay that so many of those who work in the [PHS] receive."); *id.* at 42,977 (Sen. Javits) (PHS per-

sonnel "just could not afford to take out the customary liability insurance."); see also *Cuoco*, 222 F.3d at 108 ("[Section 233(a)] may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order to better serve, among others, federal prisoners."). Allowing a *Bivens* claim would thus undermine Section 233(a)'s grant of immunity to protect PHS personnel from personal financial liability arising out of their medical duties. And in doing so, it would undermine as well PHS's ability to recruit qualified medical personnel to furnish critically needed services.

b. Notwithstanding Section 233(a)'s plain language, the court of appeals held that the provision does not foreclose a *Bivens* actions. The court reached that conclusion based in part on the 1988 amendments to the FTCA. Pet. App. 24a-25a. Those amendments extended the personal immunity provided by 28 U.S.C. 2679(b) (originally enacted in 1961, see Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539) to a broader class of injuries while carving out *Bivens* claims from that enhanced scope. See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, § 5, 102 Stat. 4564. Prior to the 1988 amendments, Section 2679(b) made the FTCA the exclusive remedy only for injury resulting from a federal employee's operation of a motor vehicle.[5] The

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[5] The pre-Westfall Act provision read as follows:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

28 U.S.C. 2679(b) (1982).

Westfall Act, via new Section 2679(b)(1), extended the exclusivity of the FTCA remedy to *any* injury "resulting from the negligent or wrongful act or omission" of any federal employee. 28 U.S.C. 2679(b)(1). At the same time, however, the Westfall Act added Section 2679(b)(2)(A), which states that Section 2679(b)(1)'s provision of an exclusive FTCA remedy "does not extend or apply to a civil action against an employee of the Government * * * brought for a violation of the Constitution." 28 U.S.C. 2679(b)(2)(A).

Based on Section 2679(b)(2)(A), the court of appeals read the Westfall Act to reinforce its view that Section 233(a)—though enacted long before the Westfall Act and in legislation separate from the FTCA more generally (see pp. 11-12, *supra*)—does not bar a claim based on the Constitution. Pet. App. 25a-26a. The district court went even further. That court stated that Section 233(a)'s reference to "the remedy against the United States" provided by 28 U.S.C. 1346(b) of the FTCA incorporates Section 1346(b)(1)'s statement that the FTCA remedy is "[s]ubject to the provisions of chapter 171 of this title," and that, therefore, Section 2679(b)(2)(A)—a provision found in chapter 171—directly limits Section 233(a)'s exclusivity. Pet. App. 59a-62a.[6]

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[6] Section 1346(b), part of the FTCA, provides in relevant part:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1).

Both courts erred in attaching such significance to 28 U.S.C. 2679(b)(2)(A). Section 2679(b)(2)(A) was added in 1988, eighteen years after Section 233(a)'s passage. It excluded constitutional torts only from the personal immunity that those same 1988 amendments to the FTCA newly conferred. See 28 U.S.C. 2679(b)(1) (as amended by Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4564). Nothing in the 1988 amendments to the FTCA or their legislative history purported to limit or otherwise have a bearing on the distinct (and more expansive) personal immunity conferred in separate statutes like Section 233(a). To the contrary, as the House Judiciary Committee Report noted, the 1988 amendments did "not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action, nor does it either expand or diminish rights established under other Federal statutes." H.R. Rep. No. 700, 100th Cong., 2d Sess. 7 (1988). Indeed, the absence in Section 233(a) of an exception for *Bivens* actions similar to that in Section 2679(b)(2)(A) seriously undermines the interpretation of the courts below.

To give operative legal effect here to Section 2679(b)(2)(A), a statute of general applicability, despite Section 233(a)'s unqualified mandate of exclusivity, would amount to an implied repeal of Section 233(a), a more specific statute. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007) ("normally the specific governs the general"). As this Court has noted, "repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986) (citation omitted).

The court of appeals also concluded that its decision was supported by Section 233's title in the public law ("Defense

of certain malpractice and negligence suits"),[7] on the ground that this title excludes constitutional torts. Pet. App. 22a-23a & n.11. The title of a statutory provision, however, cannot trump the unambiguous language of the statute's operative terms. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he title of a statute * * * [is] of use only when [it] shed[s] light on some ambiguous word or phrase.") (internal quotation marks and citation omitted; brackets in original). As discussed above, there is nothing ambiguous about Section 233(a). In any event, Section 233(a)'s title does not refer solely to actions sounding in common law or negligence. The term "malpractice," in particular, does not refer to a specific type of legal proceeding or claim but rather to the underlying conduct—*i.e.*, the professional misfeasance that may give rise to a cause of action. See, *e.g.*, *Webster's Third New International Dictionary* 1368 (1993) ("malpractice" is "a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury"). In addition, the title's reference to both "malpractice" and "negligence" suits strongly suggests that "malpractice" refers to a species of tort beyond "negligence" and covers as well reckless or intentional conduct—including deliberate indifference, the constitutional standard for deficient medical care (*Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)).

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[7] Section 233's title was changed to "Civil actions or proceedings against commissioned officers or employees" and the subtitle "Exclusiveness of remedy" was added to subsection (a) when the provision was codified in title 42. Compare Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 4, 84 Stat. 1870 (Dec. 31, 1970), with 42 U.S.C. 233 (1970). Title 42 has not, however, been enacted into positive law. See 1 U.S.C. 204(a) & note; *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993).

The court of appeals also reasoned that, because Section 233 was enacted in 1970, one year before the Court's decision in *Bivens*, Congress could not have had constitutional claims in mind. Pet. App. 21a. But that fact is irrelevant in light of Section 233(a)'s unqualified text stating that the FTCA remedy against the United States shall be the "exclusive" remedy for injuries arising out of medical care provided by PHS personnel. Under the court of appeals' reasoning, no pre-*Bivens* statute—no matter how absolute its text or how categorical its intent—could create an exclusive remedy. Moreover, five years after *Bivens*, Congress passed the Gonzalez Act, Pub. L. No. 94-464, § 1(a), 90 Stat. 1985, which affords immunity to medical personnel in the armed forces and which, like Section 233(a), makes the FTCA remedy "exclusive of any other civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). Congress relied on Section 233(a) as a model for that provision. See S. Rep. No. 1264, 94th Cong., 2d Sess. 8 (1976) ("legislation having a comparable effect presently exists for * * * medical personnel of the * * * Public Health Service"). As the accompanying Senate Report indicated, "[t]his protection is designed to cover *all* potential financial liability." *Id.* at 2 (emphasis added). Thus, after *Bivens*, Congress reaffirmed the completeness of Section 233(a)'s immunity.[8]

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[8] In any event, Congress would have been well aware of the concept of a constitutional tort when it enacted Section 233(a) in December 1970. See *Bivens*, 403 U.S. at 389 (noting that the Court's decision in *Bell* v. *Hood*, 327 U.S. 678 (1946), had held that a damage action against federal agents for constitutional violations stated a claim arising under the Constitution for purpose of federal question jurisdiction, but that *Bell* v. *Hood* had reserved judgment on whether the plaintiff had successfully stated a cause of action). Indeed, the Court had granted certiorari in *Bivens* itself six months before Congress enacted Section 233(a). 399 U.S. 905 (1970).

2. The court of appeals' decision is also inconsistent with this Court's precedents. In *Carlson*, the Court held that the FTCA standing alone did not bar a *Bivens* claim against federal officials. 446 U.S. at 18-23. *Carlson* involved the situation in which the relevant statute (the FTCA, as then written) was *silent* on the question whether remedies beyond an action against the United States were excluded.[9] The Court stated that a *Bivens* claim is generally available unless (1) "special factors counsel[] hesitation in the absence of affirmative action by Congress;" or (2) "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[10] *Id.* at 18-19. The Court in *Carlson* found neither condition satisfied there. In particular, the Court found nothing in the FTCA itself indicating that Congress meant to preclude *Bivens* actions; to the contrary, it stated that a post-*Bivens* amendment to the FTCA made it "crystal clear" that Congress viewed the FTCA and *Bivens* as complementary. *Id.* at 19-20.

But *Carlson* did not involve Section 233(a)—an immunity statute separate and apart from the FTCA that expressly made the FTCA remedy against the United States the "exclusive" remedy available for the type of injury asserted (personal injury arising from the provision of medical care by PHS personnel). As the Court in *Carlson* itself

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[9] As noted previously, Congress amended the FTCA in 1988 to exempt *Bivens* actions from the newly conferred exclusive FTCA remedy against the United States for suits arising out of the conduct of federal employees in certain contexts. See 28 U.S.C. 2679(b)(2)(A); see also pp. 12-13, *supra* (discussing the Westfall Act).

[10] The Court clarified that Congress did not have to recite any specific "magic words" to satisfy the alternative-remedy requirement. See *Carlson*, 446 U.S. at 19 n.5.

recognized, that distinction is dispositive. In rejecting the argument that the FTCA was the exclusive remedy for the constitutional tort alleged there, the Court in *Carlson* explained:

> This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U.S.C. § 4116(a), *42 U.S.C. § 233(a)*, 42 U.S.C. § 2458a, 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (malpractice by certain Government health personnel).

446 U.S. at 20 (emphasis added). By identifying Section 233(a) as a quintessential example of when Congress has made the FTCA an exclusive remedy, which precludes a *Bivens* action against individual federal officers and employees, *Carlson* strongly supports the government's interpretation.[11]

Since *Carlson*, the Court has consistently expressed a strong reluctance to expand the availability of a *Bivens* cause of action. See, *e.g.*, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'") (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001)); *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2597 (2007) (*Bivens* remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected

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[11] Although Congress's affirmative statement in Section 233(a) of the exclusivity of the FTCA remedy should resolve the matter, PHS's status as a uniformed service (pp. 2-3, *supra*) and the important purpose of protecting PHS personnel in lieu of liability insurance (pp. 11-12, *supra*), combined with the FTCA's reticulated remedial scheme, constitute "special factors counseling hesitation" against judicial creation of a cause of action under *Bivens* in this context.

interest, and in most instances we have found a *Bivens* remedy unjustified."); *Malesko*, 534 U.S. at 68-69 ("Since *Carlson*, we have consistently refused to extend *Bivens* liability to any new context or new category of defendants. * * * So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability."); *Schweiker* v. *Chilicky*, 487 U.S. 412, 421-423 (1988) ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation."); *Bush* v. *Lucas*, 462 U.S. 367, 374-390 (1983) (refusing to provide *Bivens*-type remedy given alternative remedial scheme created by Congress).

Thus, as the D.C. Circuit has noted, "subsequent to *Carlson*, the Court clarified that there does not need to be an equally effective alternate remedy" in order to bar the fashioning of a cause of action under *Bivens*. *Wilson* v. *Libby*, 535 F.3d 697, 708 (2008), cert. denied, No. 08-1043 (June 22, 2009); see *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) ("As we read *Chilicky* and *Bush* together, then, courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies."). Accordingly, the Court's precedents support the government's plain-text interpretation of Section 233(a) as precluding a *Bivens* remedy against individual PHS personnel, above and beyond the FTCA remedy against the United States that Congress expressly declared to be "exclusive."

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2009

JOINT APPENDIX

147 B448

(6)

No. 08-1529

Supreme Court, U.S.
FILED
DEC 4 - 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,

Petitioners,

v.

YANIRA CASTANEDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed June 11, 2009
Certiorari Granted September 30, 2009

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District Court's Amended Order Denying Individual Public Health Service Defendants' Motion to Dismiss ..... Pet. App. 41a-80a

Opinion of the United States Court of Appeals for the Ninth Circuit ..... Pet. App. 1a-40a

Ninth Circuit's Order Denying Rehearing En Banc ..... Pet. App. 81a-82a

Transcript of Oral Argument in Ninth Circuit ..... Opp. Pet. 1a-66a

RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Date Filed	#	Docket Text
11/02/2007	1	COMPLAINT against Defendants Timothy Shack, Esther Hui, Stephen Gonsalves, Claudia Mazur, Daniel Hunting, DOES 1-10, The United States of America California, George Molinar, Chris Henneford, Jeff Brinkley, Gene Migliaccio. (Filing fee $350 Paid) Jury Demanded., filed by plaintiff Francisco Castaneda. (ghap) (Entered: 11/13/2007)
		* * *
01/14/2008	19	NOTICE OF MOTION AND MOTION to Dismiss for Lack of Jurisdiction [*Fed.R.Civ.P. 12(b)(1)*] filed by Federal Public Health Service Defendants Timothy Shack, Esther Hui, Stephen Gonsalves, Chris Henneford, Gene Migliaccio. Motion set for hearing on 2/25/2008 at 10:00 AM before Judge Dean D. Pregerson. (Attachments: #1 Exhibit A [Complaint] to Federal Defendants' MTD# 2 Exhibit B [Macrae Decl.] to Federal Defendants' MTD# 3 Exhibit C [Birney Decl.] to Federal Defendants' MTD# 4 Exhibit D [O'Brien Certification] to Federal Defendants' MTD)(Khorshid, Anoiel) (Entered: 01/14/2008)
		* * *

02/04/2008	28	MINUTES OF IN CHAMBERS ORDER held before Judge Dean D. Pregerson : COUNSEL ARE NOTIFIED that on the Court's own motion the STIPULATION TO AMEND FILED BY PLAINTIFF FRANCISCO CASTANEDA 23 is hereby GRANTED. Counsel shall file the Amended Complaint forthwith. (lc) (Entered: 02/04/2008)
		* * *
02/06/2008	31	AMENDED COMPLAINT against defendants S Pasha, M Sheridan, A Leong, Timothy Shack, Esther Hui, Stephen Gonsalves, Claudia Mazur, Daniel Hunting, DOES 1-10, The United States of America, George Molinar, Chris Henneford, Gene Migliaccio amending Complaint – (Discovery) 1 ,filed by plaintiff Francisco Castaneda (lc) (Entered: 02/07/2008)
		* * *
02/11/2008	33	MEMORANDUM in Opposition to MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[FedR.Civ.P. 12(b)(1)]* 19 filed by Plaintiff Francisco Castaneda. (Doyle, Conal) (Entered: 02/11/2008)

02/11/2008	34	DECLARATION of Amy Radon In Opposition to Defendants' 12(b)(1) Motion to Dismiss MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* 19 filed by Plaintiff Francisco Castaneda. (Attachments: # 1 Exhibit Exhibits 1-6 of Radon Dec)(Doyle, Conal) (Entered: 02/11/2008)
02/11/2008	35	DECLARATION of Claudia Mazur In Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* 19 filed by Plaintiff Francisco Castaneda. (Attachments: # 1 Exhibit Exhibits 1-5 of Mazur Dec)(Doyle, Conal) (Entered: 02/11/2008)
02/11/2008	36	DECLARATION of Tom Jawetz In Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* 19 filed by Plaintiff Francisco

		Castaneda. (Attachments: #1 Exhibit Exhibit 1 to Jawetz Dec# 2 Exhibit Exhibit 2 to Jawetz Dec# 3 Exhibit Exhibit 3 to Jawetz Dec# 4 Exhibit Exhibit 4 to Jawetz Dec# 5 Exhibit Exhibit 5 to Jawetz Dec# 6 Exhibit Exhibit 6 to Jawetz Dec) (Doyle, Conal) (Entered: 02/11/2008)
02/11/2008	37	DECLARATION of Conal Doyle In Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* 19 filed by Plaintiff Francisco Castaneda. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7 #8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10# 11 Exhibit 11# 12 Exhibit 12# 13 Exhibit 13# 14 Exhibit 14# 15 Exhibit 15# 16 Exhibit 16# 17 Exhibit 17# 18 Exhibit 18# 19 Exhibit 19# 20 Exhibit 20# 21 Exhibit 21 #22 Exhibit 22# 23 Exhibit 23# 24 Exhibit 24# 25 Exhibit 25# f26 Exhibit 26# 27 Exhibit 27 #28 Exhibit 28# 29 Exhibit 29# 30 Exhibit 30# 31 Exhibit 31 # 32 Exhibit 32# 33 Exhibit 33# 34 Exhibit Exhibit 34# 35 Exhibit 35) (Doyle, Conal) (Entered: 02/11/2008)

02/12/2008	38	ANSWER to Amended Complaint, 31 *Stipulation to Accept Federal Defendants' Prior Responses to the Complaint as Their Responses to Plaintiff's First Amended Complaint* filed by defendant Timothy Shack, Esther Hui, Stephen Gonsalves, United States of America, Chris Henneford, Gene Migliaccio. (Attachments: # 1 Proposed Order)(Staub, Keith) (Entered: 02/12/2008)
		* * *
02/13/2008	40	ORDER that the Court accepts the parties Stipulation 38 to Accept Federal Defendants Prior Responses to the Complaint as Their Responses to Plaintiffs First Amended Complaint (FAC) and orders that both the United States answer and the individual federal defendants (Timothy Shack, Esther Hui, Stephen Gonsalves, Chris Henneford and Gene Migliaccio) motion to dismiss be deemed their responses to the FAC. by Judge Dean D. Pregerson (lc) (Entered: 02/13/2008)
		* * *
12/15/2008	42	REPLY In Support of Motion MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* MOTION to Dismiss for Lack of

		Jurisdiction *[Fed.R.Civ.P. 12(b)(1)]* 19 filed by Defendants Timothy Shack, Esther Hui, Stephen Gonsalves, United States of America, George Molinar, Chris Henneford, Gene Migliaccio. (Attachments: #1 Proof of Service) (Khorshid, Anoiel) (Entered: 02/15/2008)
02/21/2008	43	Suggestion of Death filed by Plaintiff Francisco Castaneda (Doyle, Conal) (Entered: 02/21/2008)
02/21/2008	44	NOTICE OF MOTION AND MOTION to Substitute Plaintiff YANIRA CASTANEDA, as personal representative of the Estate of Francisco Castaneda; VANESSA CASTANEDA, as the heir and beneficiary of the Estate by and through her mother and guardian, LUCIA PELAYO for Plaintiff FRANCISCO CASTANEDA filed by plaintiff Francisco Castaneda.Motion set for hearing on 3/17/2008 at 10:00 AM before Judge Dean D. Pregerson. (Attachments: # 1 Exhibit Second Amended Complaint) (Doyle, Conal) (Entered: 02/21/2008)
02/21/2008	45	STIPULATION for Hearing re Defendants' Motion to Dismiss filed by Plaintiff Francisco Castaneda. (Doyle, Conal) (Entered: 02/21/2008)

* * *

02/22/2008	47	ORDER The court accepts the parties Stipulation to Accept Federal DefendantsPrior Responses to the Amended Complaint as Their Responses to PlaintiffsSecond Amended Complaint 45 and orders that both the United Statesanswer and the individual federal defendants (Timothy Shack, Esther Hui,Stephen Gonsalves, Chris Henneford and Gene Migliaccio) motion to dismiss bedeemed their responses to the SAC and that the Hearing set for February 25, 2008proceed as scheduled. by Judge Dean D. Pregerson (lc) (Entered: 02/22/2008)
02/25/2008	48	MINUTES OF Motion Hearing held before Judge Dean D. Pregerson :Scheduling Conference continued to 3/10/2008 at 4:00 PM before Judge Dean D. Pregerson.Court Reporter: Maria Bustillos. (sce) (Entered: 02/26/2008)
		* * *
03/11/2008	63	AMENDED ORDER denying individual Public Health Service Defendants MOTION to Dismiss for Lack of Jurisdiction 19 by Judge Dean D. Pregerson 19 (csb) (Entered: 03/11/2008)
		* * *

03/12/2008	67	ORDER granting plaintiffs MOTION to Substitute and or Amend complaint; Plaintiff shall file a Second Amended Complaint within thirty (30) days of the issuance of this order 44 by Judge Dean D. Pregerson (lc) (Entered: 03/13/2008)

* * *

03/20/2008	82	SECOND AMENDED COMPLAINT against defendants Timothy Shack, Esther Hui, S Pasha, M Sheridan A Leong, Stephen Gonsalves, Claudia Mazur, Daniel Hunting, DOES 1-10, United States of America, George Molinar, Chris Henneford, Gene Migliaccio amending Amended Complaint, 31,filed by plaintiffs Vanessa Castaneda, Yanira Castaneda (lc) Additional attachment(s) added on 3/27/2008 (lc,). (Entered: 03/26/2008)

* * *

03/21/2008	80	NOTICE OF MOTION AND MOTION to Stay Case pending appeal *for 60 days and Memorundum of P&A in Support of Motion* filed by defendant Timothy Shack, Esther Hui, Stephen Gonsalves, United States of America, George Molinar, Chris Henneford, Gene Migliaccio. Motion set for hearing on 4/21/2008 at 10:00 AM before Judge Dean D.

Pregerson. (Attachments: # 1 Exhibit exh 1# 2 Exhibit exh 2) (Staub, Keith) (Entered: 03/21/2008)

* * *

03/26/2008 83 AMENDED ANSWER to Amended Complaint, 82 *[United States of America's Amended Answer to Plaintiffs' Second Amended Complaint]* filed by Federal Defendant United States of America. (Khorshid, Anoiel) (Entered: 03/26/2008)

* * *

04/07/2008 88 MEMORANDUM in Opposition to MOTION to Stay Case pending appeal *for 60 days and Memorandum of P&A in Support of Motion* 80 filed by Plaintiffs Yanira Castaneda, Vanessa Castaneda. (Doyle, Conal) (Entered: 04/07/2008)

04/07/2008 89 DECLARATION of Tom Jawetz in Opposition to MOTION to Stay Case pending appeal *for 60 days and Memorandum of P&A in Support of Motion* 80 filed by Plaintiffs Yanira Castaneda, Vanessa Castaneda. (Attachments: # 1 Exhibit to Jawetz Dec# 2 Exhibit 2 to Jawetz Dec# 3 Exhibit 3 to Jawetz Dec# 4 Exhibit 4 to Jawetz Dec# 5 Exhibit 5 to Jawetz Dec# 6 Exhibit 6 to Jawetz Dec# 7 Exhibit 7 to Jawetz Dec# 8 Exhibit 8# 9 Exhibit 9 to Jawetz Dec) (Doyle, Conal) (Entered: 04/07/2008)

04/07/2008	90	DECLARATION of Conal Doyle in Opposition to MOTION to Stay Case pending appeal *for 60 days and Memorandum of P&A in Support of Motion* 80 filed by Plaintiffs Yanira Castaneda, Vanessa Castaneda. (Attachments: #1 Exhibit Exh 1 to Doyle Dec# 2 Exhibit 2 to Doyle Dec# 3 Exhibit 3 to Doyle Dec# 4 Exhibit 4 to Doyle Dec# 5 Exhibit 5 to Doyle Dec# 6 Exhibit 6 to Doyle Dec# 7 Exhibit 7 to Doyle Dec# 8 Exhibit 8 to Doyle Dec# 9 Exhibit 9 to Doyle Dec# 10 Exhibit 10 to Doyle Dec# 11 Exhibit 11 to Doyle Dec# 12 Exhibit 12 to Doyle Dec)(Doyle, Conal) (Entered: 04/07/2008)
04/07/2008	91	EXHIBIT Filed filed by Plaintiffs Yanira Castaneda, Vanessa Castaneda. *Exh 13, Part 1 Hui Exhibits* as to Declaration (Motion related), Declaration (Motion related), Declaration (Motion related) 90. (Doyle, Conal) (Entered: 04/07/2008)
04/07/2008	92	EXHIBIT Filed filed by Plaintiffs Yanira Castaneda, Vanessa Castaneda. *Exh 13 to Doyle Dec, Part 2 Hui Exhibits* as to Declaration (Motion related), Declaration (Motion related), Declaration (Motion related) 90 . (Doyle, Conal) (Entered: 04/07/2008)

* * *

04/18/2008 99 NOTICE OF APPEAL to the 9th CCA filed by Federal Defendants Timothy Shack, Esther Hui, Stephen Gonsalves, Chris Henneford, Gene Migliaccio. Appeal of Order, 63 , Filed On: 3/11/08; Entered On: 3/11/08; GOVERNMENT FEE WAIVED. (Attachments: # 1 Court's March 11, 2008 Amended Order Denying Federal Defendants' MTD)(Khorshid, Anoiel)cc: Anoeil Khorshid, Office of United States Attorney; Adele P. Kimmel, Public Justice, Conal Doyle, Laura R. Anderson, Jones Day, Deborah C. Saxe, Larry Dunlap, James A. Creason. Modified on 4/21/2008 (lr,). (Entered: 04/18/2008)

* * *

04/24/2008 110 NOTICE OF ADMISSION OF LIABILITY FOR MEDICAL NEGLIGENCE filed by DEFENDANT United States of America. (Staub, Keith) (Entered: 04/24/2008)

* * *

05/12/2008 117 DECLARATION of Conal Doyle In Opposition to MOTION to Stay Case pending Interlocutory Appeal 112 filed by Plaintiffs Yanira Castaneda, Vanessa Castaneda. (Attachments: # 1 Exhibit 1 to Doyle Dec# 2 Exhibit 2 to Doyle Dec# 3 Exhibit 3 to Doyle Dec# 4

Exhibit 4 to Doyle Dec)(Doyle, Conal) (Entered: 05/12/2008)

* * *

05/15/2008 119 DECLARATION of Conal Doyle In Opposition To MOTION to Stay Case pending Interlocutory Appeal 112 filed by Plaintiffs Yanira Castaneda, Vanessa Castaneda. (Attachments: # 1 Exhibit 1 to Doyle Dec# 2 Exhibit 2 to Doyle Dec)(Doyle, Conal) (Entered: 05/15/2008)

* * *

05/20/2008 121 ORDER DENYING OF INDIVIDUAL PUBLIC HEALTH SERVICE DEFENDANTS' MOTION AND MOTION to Stay Case pending Interlocutory Appeal and allows discovery to proceed filed by 112 by Judge Dean D. Pregerson (lc) (Entered: 05/20/2008)

* * *

05/29/2008 123 TRANSCRIPT for proceedings held on 5/19/08; 10:00 a.m.. (Bustillos, Maria) (Entered: 05/29/2008)

* * *

05/29/2008 128 THIRD AMENDED COMPLAINT against defendants Department of Homeland Security, Immigration and Customs Enforcement, Division of Immigration Health Services, Michael Chertoff, Timothy Shack,

Esther Hui, S Pasha, M Sheridan, A Leong, Stephen Gonsalves, Claudia Mazur, Daniel Hunting, DOES, United States of America, George Molinar, Chris Henneford, Gene Migliaccio amending Amended Complaint, 82 ,filed by plaintiffs Yanira Castaneda, Vanessa Castaneda (lc) (lc). (Additional attachment(s) added on 6/19/2008: # 1 60 day sms issued, # 2 Issd sms 20 day) (lc). (Entered: 05/30/2008)

* * *

04/16/2009 186 NOTICE OF MOTION AND MOTION to Amend *Third Amended Complaint* filed by Plaintiff Yanira Castaneda, Vanessa Castaneda. Motion set for hearing on 5/4/2009 at 10:00 AM before Judge Dean D. Pregerson. (Doyle, Conal) (Entered: 04/16/2009)

04/16/2009 187 DECLARATION of Conal Doyle In Support Of MOTION to Amend *Third Amended Complaint* 186 filed by Plaintiffs Yanira Castaneda, Vanessa Castaneda. (Attachments: # 1 Exhibit 1 to Doyle Dec)(Doyle, Conal) (Entered: 04/16/2009

* * *

06/16/2009 206 Notice of Withdrawal of Motion to Amend/Correct 186 filed by Plaintiff Yanira Castaneda, Vanessa

Castaneda. (Doyle, Conal) (Entered: 06/16/2009

* * *

06/29/2009 211 MINUTES OF Motion Hearing and Status Conference held before Judge Dean D. Pregerson: court hears oral argument and GRANTS the motion to amend thecomplaint as to Robert Mekemson 186 . The Court set the following dates:Last day to join other State defendants: 7/29/09; last day to join other Federal defendants: 9/28/09; Motion Cut-Off as to State defendants only: 10/15/09; Fact Discovery Cut-off: 2/1/10; Motion Cut-off (other that State defendants):4/1/10; Scheduling Conference:2/8/10 at 11:30 a.m. The Court orders that the presumptive number of depositions permitted as to Plaintiffs non-Bivens claims is 30. Either party may reduce or add to this number of depositions upon a motion demonstrating good cause. Court Reporter: Katie Thibodeaux. (lc) (Entered: 06/29/2009)

* * *

10/21/2009 216 STIPULATION to Dismiss defendants Timothy Shack, Chris Henneford, Gene Migliaccio filed by plaintiff Yanira Castaneda, Vanessa Castaneda. (Attachments: # 1 Proposed Order)(Doyle, Conal)

(Entered: 10/21/2009)

10/23/2009	217	ORDER Approving Stipulation to Dismiss Chris Henneford, Eugene Migliaccio, and Timothy Shack, M.D. 216 by Judge Dean D. Pregerson. The parties stipulation for dismissal is approved and TIMOTHY SHACK, M.D., EUGENE MIGLIACCIO, and CHRIS HENNEFORD are hereby DISMISSED with prejudice. Each party to bear its own fees and costs. (sch) (Entered: 10/23/2009)

08-55684 Docket

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

07/14/2008 ☐ 17 Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) Defendants-Appellants, all employees of the United States Public Health Service ("PHS"), move for a stay pending determination of their appeal of the district court's decision that they are not entitled to absolute immunity from claims brought against them in their individual capacities pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). We grant their motion, and expedite briefing on the merits of the appeal. (Although the initial stay motion was filed by Defendant-Appellant Dr. Eugene A. Migliaccio alone, Defendants-Appellants Stephen Gonsalves, Chris Henneford, Dr. Esther Hui, and Dr. Timothy Shack filed motions to join in Dr. Migliaccio's request for a stay. The motions to join are hereby granted.) We have held that a defendant's non-frivolous appeal on immunity grounds "automatically divest[s] [the district court] of jurisdiction to proceed with trial pending appeal." Chuman v. Wright,

960 F.2d 104, 105 (9th Cir. 1992). More important here, in such case, discovery may not proceed either. Immunity encompasses "a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery . . . , as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982)). Because the PHS defendants raise a non-frivolous appeal on immunity grounds, the district court erred in exercising its discretion and determining that discovery may continue pending resolution of that appeal. PHS defendants are entitled to a stay of discovery on the Bivens claims, contained in Counts 9 and 10 of the Third Amended Complaint, pending our determination of their immunity appeal. "The . . . right to immunity[,]" however, "is a right to immunity from certain claims, not from litigation in general. . . ." Behrens, 516 U.S. at 312 (emphasis in original). "[W]here an appeal is allowed from an interlocutory order, the district court may still proceed with matters not involved in the appeal." Alice L. v. Dusek, 492 F.3d 563, 565-65 (5th Cir.

2007) (internal citation and quotation marks omitted). We therefore find no abuse of discretion in the district court's determination that full discovery may proceed with respect to the numerous non-Bivens claims contained in the Third Amended Complaint, including the FTCA claims against the United States (Counts 1-8), the section 1983 claims against state officials (Count 11), the medical negligence claims against individual defendants (Counts 12-13), and the constitutional challenge to the government's policy governing the provision of medical care to immigrant detainees (Count 14). To the extent that the PHS defendants may have relevant information regarding any of those claims, they are subject to discovery in the same manner as all other persons. In order to allow the trial to proceed in an orderly manner, we expedite hearing on the merits of the PHS defendants' absolute immunity claim. The Defendants-Appellants shall submit an opening brief within two weeks of the date of this order. Plaintiffs-Appellees shall respond within ten days of the filing of the opening brief. Any reply by Defendants-Appellants must be submitted within five days of the filing of the response brief. No request for any

extension of time will be entertained. It is so ordered. (KD)

* * *

07/29/2008 ☐ 19 Filed original and 15 copies of Appellant Gene Migliaccio (Informal: No) opening brief of 16 pages. Five copies Excerpts of record in 2 volumes. Served on 07/28/2008. [PANEL via cal unit] – [Edited 07/31/2008 by AW] (LA)

07/29/2008 ☐ 20 Filed original and 15 copies of Appellant Esther Hui, M.D.'s 2 page joinder. Joining into Appellant Gene Migliaccio's opening brief. Served on 07/28/2008. [cc PANEL] – [Edited 07/31/2008 by AW] (LA)

* * *

08/07/2008 ☐ 30 Filed Appellees' supplemental excerpts of record on appeal in 2 volumes. (FEDEX TO PANEL) (LA)

* * *

08/08/2008 ☐ 32 Filed original and 15 copies of Appellees' answering brief of 60 pages. Served on 08/07/2008. (FEDEX TO PANEL) (LA)

* * *

08/13/2008 ☐ 35 Filed original and 15 copies of Appellants Chris Henneford and Gene Migliaccio's (Informal: No) reply brief

of 10 pages. Served on 08/12/2008. (FAX TO PANEL) (LA)

08/13/2008 ☐ 36 Filed Appellant Stephen Gonsalves notice of joinder in defendant-appellant Migliaccio's opening brief; Served on 08/11/2008. FAXED PANEL (MT)

* * *

08/15/2008 ☐ 38 Filed Appellant Stephen Gonsalves notice of joinder in defendant-appellants Migliaccio's and Henneford's reply brief. Served on 08/14/2008. FAXED PANEL (MT)

08/15/2008 ☐ 39 ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.. (LN)

10/02/2008 ☐ 40 FILED OPINION (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) AFFIRMED. FILED AND ENTERED JUDGMENT. (PH)

* * *

11/14/2008 ☐ 44 Filed (ECF) Appellant Gene Migliaccio petition for rehearing en banc (from 10/02/2008 opinion). Date of service: 11/14/2008. [6707411] (MSF)

11/14/2008 ☐ 45 Filed original and 50 copies of Appellant Chris Henneford's petition for rehearing en banc only.

Number of Pages: 14. Served on 11/13/2008. Date circulated to the court: 11/17/2008 (ACTIVE JUDGES – ANY INTERESTED SENIOR JUDGES) (LC)

* * *

11/19/2008 ☐ 48 Received Appellant Esther Hui, M.D.'s notice of joinder in appellant's Eugene A. Migliaccio and Chris Henneford's petition for rehearing en banc. (faxed PANEL). (LC)

01/29/2009 ☐ 49 Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) The panel has unanimously voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED (KKW)

EXHIBIT B

[LOGO] **DEPARTMENT OF HEALTH & HUMAN SERVICES**

Health Resources and Services Administration

Bureau of Primary Health Care
Rockville MD 20857

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Francisco Castaneda, Plaintiff, v. United States, *et al.*, Defendants.	Case No. 2:07-cv-07241-DDP-JC

DECLARATION OF JAMES MACRAE

(Filed Jan. 14, 2008)

1. I am the Associate Administrator for the Bureau of Primary Health Care (BPHC) in the Health Resources and Services Administration (HRSA), a Public Health Service agency within the U.S. Department of Health and Human Services ("the Department"). At all times relevant to the Complaint in this case, the Division of Immigration Health Services (DIHS) was part of BPHC, which was part of HRSA. HRSA is now, and was, at all times relevant to the Complaint in this case, a Public Health Service agency, as specified in the Department's Statement

of Organization. 60 Fed. Reg. 56605, November 9, 1995 (attached as Exhibit 1 to this Declaration).

2. I have served as Associate Administrator of BPHC since May 2006, and served in other positions in HRSA since 1992. As Associate Administrator, my responsibilities included overseeing DIHS, which provided health care services to immigration detainees at U.S. Immigration and Customs (ICE) detention facilities throughout the United States. At all times relevant to this Complaint, these medical services were provided under an interagency agreement between ICE and HRSA.

3. I am familiar with the personnel records of Timothy Shack, M.D., who, at all times relevant to the Complaint in this case, served as the Medical Director, DIHS, as a federal civilian employee.

4. I am familiar with the personnel records of Esther Hui, M.D., who at all times relevant to the Complaint in this case, was a federal civilian employee of DIHS, serving as either a staff physician or the Clinical Director at the U.S. Immigration and Customs Enforcement Medical Referral Center, San Diego, California.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Dated at Washington, D.C., this 14th day of January, 2008.

/s/ James Macrae
JAMES MACRAE
Associate Administrator

EXHIBIT 1-B

(Filed Jan. 14, 2008)

60 FR 56605

NOTICES

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of the Secretary and Public Health Services; Statement of Organization, Functions, and Delegations of Authority

Thursday, November 9, 1995

Under the authority of Section 6 of Reorganization Plan No. 1 of 1953 and Section 2 of Reorganization Plan No. 3 of 1966, 5 U.S.C. 301, and pursuant to the authorities vested in me as Secretary of Health and Human Services, I hereby order a reorganization within the DHHS that affects the Office of the Secretary and the U.S. Public Health Service. This Notice amends the following portions of Part A and Part H of the Statement of Organization, Functions, and Delegation of Authority for the Department of Health and Human Services: Part A, Chapter AA,

Office of the Secretary, as amended at 49 FR 32257-58 and last amended at 60 FR 51480, 10/2/95; and Part H, Chapter H as last amended at 52 FR 47053-4, 12/11/87, and Chapter HA as last amended at 60 FR 51480, 10/2/95. The changes designate the Public Health Service agencies as Operating Divisions reporting directly to the Secretary, establish the Office of Public Health and Science within the Office of the Secretary and delete the Office of the Assistant Secretary for Health. The changes are as follows:

I. Amend Chapter H of the Statement of Organization, Functions, and Delegations of Authority. Delete Section H-10 Public Health Service, Organization; and Section H-30 Public Health Service, Order of Succession, in their entirety.

II. Designate the following Public Health Service agencies as Operating Divisions within the Department of Health and Human Services and assign the following new Part designations in the Statement of Organization, Functions, and Delegations of Authority:

- Agency for Health Care Policy and Research-Part (E)
- Agency for Toxic Substances and Disease Registry – Part (J)
- Centers for Disease Control and Prevention – Part (C)
- Food and Drug Administration – Part (D)

- Health Resources and Services Administration – Part (R)
- Indian Health Service – Part (G)
- National Institutes of Health – Part (N)
- Substance Abuse and Mental Health Services Administration – Part (M)

The Statement of Organization, Functions and Delegations of Authority, for the newly established Operating Divisions, and their respective Chapters, will remain intact, until either superseded or amended.

III. Amend Chapter HA as follows:

A. Transfer from the Office of the Assistant Secretary Part H, Chapter HA, Office of the Assistant Secretary for Health, the following components, along with their respective functional responsibilities to Part A, Office of the Secretary:

- Office on Women's Health (HAW)
- Office of Minority Health (HAM)
- President's Council on Physical Fitness and Sports (HAC)
- Office of Research Integrity (HAG)
- Office of Population Affairs (HA5)
- Office of International and Refugee Health (HAL)

- Office of HIV/AIDS Policy (HAH) – Office of Emergency Preparedness (HAP)
- Office of Disease Prevention and Health Promotion/Planning and Evaluation (HAV)
- Office of the Surgeon General (HAN)

B. Delete the remaining portion of Chapter HA, in its entirety.

IV. Amend Part A, Chapter AA, "the Office of the Secretary," Section AA.10 Organization by inserting the following title at the end of the section: "Office of Public Health and Science."

V. Establish a new Chapter AC, under Part A, to read as follows: Office of Public Health and Science

AC.00 Mission

AC.10 Organization

AC.20 Functions

AC.30 Delegations of Authority

Section AC.00 Mission. The Office of Public Health and Science (OPHS) is under the direction of the Assistant Secretary for Health, who serves as the Secretary's Senior Advisor for Public Health and Science. The Office serves as the focal point for leadership and coordination across the Department in public health and science; provides direction to program offices within OPHS, and, where required by law, to other HHS components; and provides advice

and counsel on public health and science issues to the Secretary.

Section AC.10 Organization. The Office of Public Health and Science (AC) is under the direction of the Assistant Secretary for Health and consists of the following components:

A. Immediate Office (ACA)

B. Office on Women's Health (ACB)

C. Office of Minority Hea[illegible] (ACC)

D. Office of the President's Council on Physical Fitness and Sports (ACE)

E. Office of Research Integrity (ACF)

F. Office of Population Affairs (ACG)

G. Office of International and Refugee Health (ACH)

H. Office of HIV/AIDS Policy (ACJ)

I. Office of Emergency Preparedness (ACK)

J. Office of Disease Prevention and Health Promotion (ACL)

K. Office of the Surgeon General (ACM)

Section AC.20 Functions.

A. Office of Public Health and Science (AC). The Office of Public Health and Science (OPHS), and, where required by law, other HHS components, are under the direction of the Assistant Secretary for Health (ASH) who is responsible to the Secretary for

the conduct of a variety of advisory, coordinative, implementation, management, developmental, and representational activities in public health and science. The Office consists of specialized staffs that focus on cross-cutting public health and science issues of major significance to the Nation.

B. The Immediate Office (ACA). The Immediate Office: (1) Provides direction to program offices within OPHS; (2) provides advice to assure that the Department conducts broad based public health assessments designed to better define public health problems and to design solutions to those problems; assists other components within the Department in anticipating future public health issues and problems, and provides assistance to ensure that the Department designs and implements appropriate approaches, interventions, and evaluations, to maintain, sustain, and improve the health of the Nation; (3) at the direction of the Secretary, provides assistance in leading and managing the implementation and coordination of Secretarial decisions for Public Health Service Operating Divisions and, at the Secretary's direction, and for that purpose, draws on staff divisions and other organizational units for assistance in regard to legislation, budget, communications, and policy analysis; (4) provides a focus for leadership on matters including recommendations for policy on population-based public health and science and at the Secretary's direction leads and/or coordinates initiatives that cut across agencies and operating divisions; (5) provides advice to the Secretary and senior

Department officials on budget and legislative issues of the Public Health Service Operating Divisions; (6) at the direction of the ASH, provides support for the Office of the Surgeon General in the exercise of statutory requirements and assigned activities, including policy setting for the Commissioned Corps; (7) works in conjunction with the Office of Intergovernmental Affairs in promoting relationships among and between State and local health departments, academic institutions, professional and constituency organizations, and the Department; (8) works in conjunction with the Assistant Secretary for Planning and Evaluation on matters of science policy analysis; (9) in consultation with the Office of International Affairs provides advice on international and refugee health policy and coordinates international health-related activities and provides advice on a broad range of health activities that may be intra- and interdepartmental in scope; coordinates and manages Departmental liaison with bilateral and multilateral health agencies; (10) provides leadership for and participates in public health system improvement and development activities, particularly as they relate to population-based public health and the public health infrastructure; and (11) communicates and interacts with national professional and constituency organizations on matters of public health and science.

C. Transfer the functional statements for Items B through K, identified under Section AC.10 Organization, to the Office of Public Health and Science,

intact, from Part H, Chapter HA, Statement of Organization, Functions and Delegations of Authority.

VI. Continuation of the Public Health Service: The newly established Operating Divisions and the Office of Public Health and Science shall constitute the Public Health Service.

VII. Continuation of Policy: Except as inconsistent with this reorganization, all statements of policy and interpretations with respect to the Office of the Secretary, and the Public Health Service heretofore issued and in effect prior to the date of this reorganization are continued in full force and effect.

VIII. Delegations of Authority: All delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegation, provided they are consistent with this reorganization.

IX. Funds, Personnel and Equipment: Transfer of organizations and functions affected by this reorganization shall be accompanied in each instance by direct and support funds, positions, personnel, records, equipment, supplies and other resources.

Dated: October 31, 1995.

Donna E. Shalala,
Secretary.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Francisco Castaneda, Plaintiff, v. United States, *et al.*, Defendants.	Case No. 2:07-cv-07241-DDP-JC

DECLARATION OF CAPTAIN DAVID BIRNEY

(Filed Jan. 14, 2008)

1. I am the Adverse Action Officer for the Commissioned Corps of the United States Public Health Service. U.S. Department of Health and Human Services ("the Department"). The Commissioned Corps is part of the U.S. Public Health Service. As Adverse Action Officer, I am familiar with the personnel records of the Corps and the status of the Corps officers.

2. I have conducted a search of Corps records concerning CDR Chris Henneford, CAPT (Retired) Eugene A. Migliaccio, the CDR Stephen Gonsalves, in relation to the assertions made in the Complaint in this case, and confirm that all three officers were on active duty as commissioned officers of the U.S. Public Health Service at all times relevant to the Complaint.

3. I further confirm that CDR Chris Henneford was assigned to the Department's Division of Immigration Health Services (DIHS), and was stationed at the U.S. Immigration and Customs Enforcement (ICE) medical facility at the San Pedro, California, Service Processing Center (SPC). He served there as a Health Services Administrator at all times relevant to the Complaint.

4. I further confirm that CAPT (Retired) Eugene A. Migliaccio was assigned to DIHS as its Director at all times relevant to the Complaint.

5. I further confirm that CDR Stephen Gonsalves was also assigned to DIHS, and was stationed at the ICE Medical Referral Center, San Diego, California. He served there as a Health Services Administrator at all times relevant to the Complaint.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

Dated at Rockville, Maryland, this 11th day of January, 2008.

/s/ David Birney
DAVID BIRNEY
CAPTAIN, USPHS
Adverse Action Officer

EXHIBIT D

CERTIFICATION OF THE UNITED STATES ATTORNEY

(Filed Jan. 14, 2008)

Pursuant to the provisions of 28 U.S.C. 2679(d)(1) and 42 U.S.C. § 233(a), and by virtue of the authority vested in me by the Attorney General of the United States under 28 C.F.R. § 15.3(a), I hereby certify as follows:

1. I have read the Complaint in this action; and,

2. On the basis of the information now available to me with respect to the incident referred to in the Complaint, defendants Stephen Gonsalves, Eugene Migliaccio, Esther Hui, Timothy Shack, Jeffrey Brinkley and Chris Henneford acted within the course and scope of their employment with the United States at all times material to such alleged incidents.

DATED: 1-11, 2008

/s/ Thomas P. O'Brien
THOMAS P. O'BRIEN
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Central District of California

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCO CASTANEDA, Plaintiff, vs. THE UNITED STATES OF AMERICA, GEORGE MOLINAR, in his individual capacity, CHRIS HENNEFORD, in his individual capacity, GENE MIGLIACCIO, in his individual capacity, TIMOTHY SHACK, M.D., in his individual capacity,	Case No.: CV07-07241 DDP (JCx) **AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** (Filed Feb. 6, 2008) **First Cause of Action** – FTCA Claim against UNITED STATES for Medical Negligence (Non-Jury Claim)

ESTHER HUI, M.D., in her individual capacity, STEPHEN GONSALVES, in his individual capacity, CLAUDIA MAZUR, in her individual capacity, DANIEL HUNTING, M.D., S. PASHA, in his/her individual capacity, M. SHERIDAN, in his/her individual capacity, and A. LEONG, in his/her individual capacity and DOES 1-10, Defendants.	**Second Cause of Action** – FTCA Claim against UNITED STATES for Negligent Establishment of Policy for Provision of Medical Care to Immigration Detainees (Non-Jury Claim) **Third Cause of Action** – FTCA Claim against the UNITED STATES for Negligent Application of Policy for Provision of Medical Care to Immigration Detainees (Non-Jury Claim) **Fourth Cause of Action** – FTCA Claim against UNITED STATES for Intentional Infliction of Emotional Distress (Non-Jury Claim) **Fifth Cause of Action** – Bivens Claim for Inadequate Medical Care against all Individually Named Defendants (except Hunting) and DOES 1-10

) **Sixth Cause of Action –**
) Bivens Claim for Equal
) Protection Violation
) against all Individually
) Named Defendants
) (except Hunting) and
) DOES 1-10
)
) **Seventh Cause of Action**
) – Section 1983 Claim
) against S. PASHA, M.
) SHERIDAN, and A.
) LEONG and DOES 1-10
)
) **Eighth Cause of Action**
) – Medical Negligence
) Claim DOES 1-10
)
) **Ninth Cause of Action**
) – Negligence Claim
) against HUNTING and
) DOES 1-10

Plaintiff, FRANCISCO CASTANEDA ("CASTANEDA"), by and through his undersigned counsel, hereby files his Complaint and Demand for Jury Trial and states as follows:

PRELIMINARY STATEMENT

1. CASTANEDA, a former immigration detainee, received such grossly inadequate medical care for a penile lesion while in California State and federal custody that he now has fatal penile cancer and had to have his penis amputated. This lawsuit charges the federal and California governments, and/or their agents, with constitutional violations, medical

negligence and other torts, based on their egregious medical neglect of CASTANEDA.

2. The Defendants' refusal to provide CASTANEDA reasonable and humane medical care while he was in custody was tantamount to torture. He was forced to endure one of the most painful, terrifying, and humiliating experiences imaginable. CASTANEDA continually pleaded for the biopsy recommended by California medical providers, federal medical providers, and outside specialists selected by the federal government, but was denied this simple and inexpensive diagnostic test. As a result, he was denied medical treatment that would have prevented his penile cancer from spreading and becoming terminal.

3. CASTANEDA was held in custody by the California Department of Corrections from December 6, 2005 to March 26, 2006. During this time, he was examined by California medical providers who documented a 2 cm. by 2 cm. lesion on his penis and issued multiple orders for a urologic consult and biopsy. Yet, CASTANEDA was denied access to a urologist and was never given a biopsy.

4. CASTANEDA was detained in Immigration and Customs Enforcement ("ICE") custody from March 27, 2006 to February 5, 2007. During his over ten months in ICE custody, federal medical providers and outside medical specialists selected by the federal government documented that the lesion on CASTANEDA's penis might be cancerous, recommended a biopsy, and recognized that the need for diagnosis and treatment

was urgent. Yet, the federal government denied CASTANEDA the medical diagnosis and treatment both recommended and needed. All the while, CASTANEDA's condition grew worse. He experienced extreme pain, swelling, tumor growth, bleeding, drainage and a discharge, a foul odor, and the inability to urinate standing up.

5. Finally, after prolonged pressure from the ACLU National Prison Project, the federal government scheduled CASTANEDA for a biopsy to occur in February 2007, but released CASTANEDA from custody just a few days before the scheduled biopsy, presumably so it would not have to pay for the procedure or any subsequent medical treatment he would need. Ultimately, the federal government *never* provided CASTANEDA with any treatment for his obvious penile disease during his entire ten-month detention.

6. Shortly after his release from ICE custody, CASTANEDA went to the emergency room at Harbor-UCLA Hospital in Los Angeles on February 8, 2007. After performing a biopsy, Harbor-UCLA doctors diagnosed him with invasive squamous cell carcinoma of the penis and amputated his penis on Valentine's Day, February 14, 2007. By the time he received treatment at Harbor-UCLA, CASTANEDA's penile cancer had already metastasized (spread) to his lymph nodes. CASTANEDA has been undergoing chemotherapy at Harbor-UCLA in the hope of shrinking a massive inguinal tumor that is too large for surgical removal.

7. The prognosis for metastatic penile cancer is poor and CASTANEDA now has a drastically reduced life expectancy, a profound result of the Defendants' refusal to provide him the most basic medical care in a timely fashion. He will have to endure painful and grueling medical treatment, including chemotherapy and surgery, during the remaining years of his life. CASTANEDA will also incur a crushing debt for his medical treatment.

JURISDICTION AND VENUE

8. Jurisdiction of the court is proper under 28 U.S.C. §§ 1331, 1343(3), and 1346.

9. Venue is proper in this district pursuant to 28 USC § 139 (b)(2), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed. Venue is also proper pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed and the plaintiff is a resident of the judicial district.

10. This is an action for medical negligence and civil rights violations pursuant to applicable California statutes, 42 USCA § 1983, 28 U.S.C. § 2674 (the Federal Tort Claims Act), and Bivens claims for inadequate medical care and equal protection violations under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

11. Compensatory damages are sought pursuant to applicable California statutes, 42 U.S.C. § 1983, the Federal Tort Claims Act, and the Bivens claims. Punitive damages are sought against all Defendants sued in their individual capacity pursuant to applicable California statutes, 42 USCA § 1983, and the Bivens claims.

12. Attorneys' fees and costs are sought pursuant to 42 U.S.C. § 1988 for Plaintiff's claim under 42 USCA § 1983 and pursuant to applicable California law for Plaintiff's state law claims.

13. This Court has supplemental jurisdiction to consider state causes of action under 28 USCA §1367, as the ancillary state claims "form part of the same case or controversy" as other counts for which this Court has jurisdiction.

14. All governmental entities were notified of this claim in a timely fashion and all administrative exhaustion and notice requirements under both the FTCA and state statutes have been satisfied.

PARTIES

15. CASTANEDA is an adult male natural person and a resident of the State of California, County of Los Angeles. At all relevant times, he was detained and in the custody of either the United States as a "civil or pre-trial detainee," or the State of California as a convicted prisoner.

16. THE UNITED STATES OF AMERICA ("UNITED STATES" or "the GOVERNMENT") is a governmental entity with jurisdiction and control over Immigration and Customs Enforcement ("ICE") and the Department of Immigration Health Services ("DIHS"). Plaintiff was detained in two ICE facilities during the relevant time period: San Diego Correctional Facility ("SDCF") in San Diego and San Pedro Service Processing Center ("San Pedro") in Los Angeles County.

17. S. PASHA, M. SHERIDAN, and A. LEONG were medical providers employed by the State of California in the Department of Corrections and Rehabilitation, who were acting under color of state law, while ostensibly providing medical services to the PLAINTIFF during his incarceration by the State of California.

18. GEORGE MOLINAR ("MOLINAR"), at all relevant times, was the ICE Officer-in-Charge at San Pedro and was directly responsible for the care and medical treatment received by detainees at that facility. He was also responsible for arranging specialized health care and hospitalization for detainees within the local community. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

19. CHRIS HENNEFORD ("HENNEFORD"), at all relevant times, was the Health Services Administrator of San Pedro. As the Health Services Administrator, HENNEFORD was responsible for the daily administration and functioning of the health care program and medical services, and provided supervision and direction to all health services staff at San Pedro. HENNEFORD was the direct avenue of communication between DIHS medical staff and ICE officials, including the Officer-in-Charge. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

20. JEFF BRINKLEY ("BRINKLEY"), at all relevant times, was a nurse practitioner at San Pedro. In December 2006, Plaintiff met with BRINKLEY after filing several sick call requests regarding his need for surgery, as well as the pain, bleeding, and discharge that he was experiencing from his penis. BRINKLEY did nothing to treat Plaintiff's condition or to ensure that Plaintiff received treatment. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons

unrelated to medical decision making and related functions. He is being sued in his individual capacity.

21. GENE MIGLIACCIO ("MIGLIACCIO"), at all relevant times, was Director of DIHS. DIHS, a component of the U.S. Department of Health and Human Services (HHS), provides and oversees health care services to immigration detainees pursuant to an Interagency Agreement between ICE and HHS. DIHS provides primary on-site health care to detainees at both SDCF and San Pedro. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

22. TIMOTHY SHACK, M.D. ("SHACK"), at all relevant times, was Associate Director for Medical Services at DIHS. As such, SHACK was responsible for the administration and provision of health care services to individuals in ICE custody, and for developing and ensuring compliance with policies, procedures and clinical guidelines related to detainee health care. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making

and related functions. He is being sued in his individual capacity.

23. CLAUDIA MAZUR, R.N. ("MAZUR"), at all relevant times, was the Managed Care Coordinator for the Western Region of DIHS. MAZUR was responsible for responding to requests for authorization for detainee health care services, including off-site visits with specialists and subsequent surgery, from medical providers and ICE officials at facilities in the Western Region, which includes both SDCF and San Pedro. At all material times, she was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and she purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. She is being sued in her individual capacity.

24. ESTHER HUI, M.D. ("HUI"), at all relevant times, was a Medical Doctor at SDCF, and was the physician responsible for CASTANEDA's care and treatment while he was incarcerated at that facility from March 2006 until November 2006. At all material times, she was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and she purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. She is being sued in her individual capacity.

25. STEPHEN GONSALVES ("GONSALVES"), at all relevant times, was the Health Services Administrator at SDCF. At all material times, he was aware that CASTANDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

26. DANIEL HUNTING, M.D. ("HUNTING"), at all relevant times, was a private physician licensed to practice medicine in the State of California and was practicing medicine in San Diego, California. He rendered medical services to CASTANEDA on July 13, 2006 at Scripps Mercy Chula Vista Hospital. He is being sued in his individual capacity.

27. Defendants Does 1-5 are business entities of unknown form who were the employers of the individually named Defendants and/or Does 5-10. Defendants Does 1-10 are herein sued under fictitious names. Their true names and capacities are unknown to Plaintiff. Based on information and belief, Plaintiff alleges that Does 5-10 were the employees, officers, directors, managing agents, and/or supervisors of the UNITED STATES, CALIFORNIA, and/or Does 1-10 who were acting within the scope and course of their employment and authority at all times relevant to this Complaint.

FACTUAL ALLEGATIONS

28. CASTANEDA was detained in the California Department of Corrections and Rehabilitation ("DOC") after conviction by the State of California on December 6, 2005 and held until his early release date on March 26, 2006.

29. On December 8, 2005, CASTANEDA was seen by a DOC medical provider who ordered a "follow up with M.D." regarding a growth on Plainitiff's penis.

30. On December 27, 2005, a DOC medical provider, believed to be A. LEONG, entered an order to refer CASTANEDA to a urologist. Despite this referral, CASTANEDA was never allowed to see a urologist during the course of his confinement. CASTANEDA'S confinement lasted for approximately another three months.

31. On January 13, 2006, CASTANEDA filled out a Health Services Request Form, complaining of back and kidney pain and requested medical attention from the DOC. It appears that the medical staff scheduled appointments on January 20 and/or 24th, but he was not brought to the medical center by prison guards as ordered.

32. On January 30, 2006, CASTANEDA filled out another Health Services Request Form, stating that his genital warts needed to be removed, he needed help, and he needed to see a doctor soon.

33. On February 7, 2006, CASTANEDA was examined in the "wart clinic" and the DOC medical provider, believed to be S. PASHA noted a 2 cm. x 2 cm. raised white and yellow lesion on his foreskin. The doctor's assessment was to rule out squamous cell cancer and Chlamydia. For the second time, a DOC doctor ordered an "urgent urology referral." Antibiotics were also prescribed.

34. By February 17, 2006, CASTANEDA had still not received his antibiotics and they were re-ordered. At that time, M. SHERIDAN was made aware of CASTANEDA's medical condition and need for urgent urologic care.

35. On February 27, 2006, CASTANEDA was again seen by a DOC provider, who documented that he was unable to retract CASTANEDA's prepuce (the uncircumcised skin on the head of his penis) and that his lesion was foul smelling. He also documented that CASTANEDA had been referred to a urologist for removal of the lesion.

36. On March 7, 2006, CASTANEDA was seen by a medical provider (S. PASHA) for the last time during his detention with DOC. A medical provider again documented that CASTANEDA had a "2cm x 2cm raised white irregular shaped lesion to his foreskin." However, nothing was done to diagnose or treat this problem and CASTANEDA was never provided the urgent urologic consult ordered in December 2005 and again in February 2006.

37. CASTANEDA was transferred to federal custody (San Diego Correctional Facility) on March 27, 2006. He immediately brought his medical condition to the attention of the SDCF staff upon admission, specifically informing them of a lesion on his penis that was becoming painful, growing in size, bleeding, and exuding discharge.

38. On March 28, 2006, CASTANEDA was examined by Lieutenant Anthony Walker ("Walker"), a Physican's Assistant, as part of the medical intake screening process at SDCF. Walker noted Castaneda's history of genital warts and his plan called for a urology consult "ASAP" with a request for biopsy.

39. CASTANEDA was next seen by a medical provider on April 11, 2006, when Walker again assessed CASTANEDA as having a penile lesion that required ruling out cancer. Walker also documented that CASTANEDA'S mother died of pancreatic cancer at age thirty-nine.

40. CASTANEDA was not seen again by a medical provider until April 28, 2006, when he informed Walker that the lesion on his penis smelled worse and was now draining pus. Walker noted that the lesion was more macerated at the glans (penis head) and emitted a foul odor.

41. Medical personnel filed a Treatment Authorization Request form ("TAR") in April 2006 with DIHS, requesting approval to have the lesion removed for purposes of a biopsy and to have CASTANEDA's penis circumcised. The TAR noted that CASTANEDA'S

penile lesion had grown and that his pain level was measured at 8 out of 10 during urination and erection. The TAR also observed that "[patient] ("pt") has been treated for possible infections to no avail. Lesion has foul odor." The form further concluded that a biopsy should be performed "due to family history and pt discomfort, sooner the better."

42. The TAR was not approved until May 31, 2006, approximately two months after Walker ordered the consult and biopsy.

43. On June 7, 2006, the GOVERNMENT sent CASTANEDA to an outside specialist of its choice – John R. Wilkinson, M.D., Hematology Oncology Diplomat. CASTANEDA presented with a history of a fungating lesion on the left side of his foreskin. The lesion was growing and Dr. Wilkinson documented his agreement with the medical staff at SDCF "that this may represent either a penile cancer or a progressive viral based lesion." His medical record states: "Strongly agree[d] that it requires urgent urologic assessment of biopsy and definitive treatment. In this extremely delicate area and [sic] there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated . . . I spoke with the physicians at the correctional facility. I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost effective. They understand the need for urgent diagnosis and treatment."

44. Dr. Wilkinson also documented that there was "no evidence of regional lymphadenopathy, no sign of distant metastasis." This meant that there was no observable evidence that the cancer had metastasized at that point.

45. On June 7, 2006, HUI documented a conversation she had with Dr. Wilkinson regarding his examination of CASTANEDA. HUI specifically noted that CASTANEDA had a penile lesion that required a biopsy and that Dr. Wilkinson offered to admit CASTANEDA to the hospital. She then documented that the biopsy, a diagnostic procedure to rule out a life threatening disease, was an "elective outpatient procedure" and therefore refused to admit CASTANEDA for treatment at that time. She also never made arrangements for an outpatient biopsy, even though Dr. Wilkinson's note documented that HUI wished "to pursue outpatient biopsy which would be more cost effective."

46. On June 12, 2006, CASTANEDA filed a grievance asking for the surgery recommended by Dr. Wilkinson: "[Dr. Wilkinson] gave his professional opinion and recommended that I should be admitted and that surgery should be performed. At this time, Dr. Hui decided against the proposed surgery and denied the admittance. I am in a considerable amount of pain and I am in desperate need of medical attention."

47. On June 23, 2006, CASTANEDA informed Walker that his penis was getting worse: there was

more swelling to the area, a foul odor, drainage, it was more difficult to urinate, and he was bleeding from the foreskin. Walker documented that there was "obvious slightly purulent drainage from foreskin of penis next to lesion on penis." Nevertheless, the GOVERNMENT did nothing to treat the problem.

48. Also on June 23, 2006, Dr. Wilkinson's office received a telephone call from SDCF reporting that CASTANEDA'S "foreskin lesion is increased in size and pressing further on his penis causing increasing discomfort." Dr. Wilkinson noted that CASTANEDA was to see Dr. Robert Masters, M.D., a urologist, and sent a copy of CASTANEDA's medical records to Dr. Masters.

49. On June 30, 2006, Walker authored a late entry progress note, stating that CASTANEDA "DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory." Walker told CASTANEDA that he did not have cancer although Walker documented that he was not sure "what the lesion would present, if and when, the biopsy was completed." The medical record documented that "this is something that can be managed also upon his release as well if that is the concern here," that there is "a three-year history with the past few months of the lesion looking and acting a bit more angry," and that there is "a severe deformed uncircumcised foreskin growth that could use attention but this lesion is an impediment at this time according to Dr. Masters." Walker counseled CASTANEDA to be patient and wait.

50. On July 12, 2006, Walker responded to CASTANEDA'S grievance, stating: "Not resolved. Patient wants further evaluation, assessment and treatment. Patient will be reassessed and further outside resources readdressed. Patient (sic) explained that he was never denied any treatment but pre authorization must be gained prior to any treatment."

51. On July 12, 2006, Walker again examined CASTANEDA and noted that the "lesion on his penis was draining clear, foul malodorous smell, cultures before were negative for growth, negative RPR, negative HIV, foreskin bleeding at this time, and patient states his colon feels swollen, previous rectal exam showed slightly swollen prostate, deferred today." The assessment at that time was still "unknown etiology of penile lesion."

52. On July 12, 2006, Walker also authored another late entry progress note. The note stated that CASTANEDA "was not denied any treatment by Dr. Hui, although there was no active Treatment Authorization Request (TAR) placed for approval by DIHS headquarters in Washington, DC, nor was there an emergent need."

53. A TAR form was submitted on July 13, 2006, seeking emergency room evaluation and treatment for CASTANEDA, despite the fact that Walker documented that there was no emergent need to treat CASTANEDA the day before. There is no documentation explaining why the GOVERNMENT did not schedule him for the circumcision and biopsy that

was ordered by Dr. Wilkinson the previous month and Walker approximately three months prior.

54. However, the TAR form documented that ICE officials spoke with Dr. Wilkinson and Dr. Masters, who: "both strongly recommended admission, urology consultation, surgical intervention via biopsy/ exploration under anesthesia to include circumcision if non-malignant, with return follow-up with oncology depending upon findings, and potential treatment or surgery of any malignant findings."

55. The TAR form also documented that CASTANEDA'S penis was bleeding, had drainage, malodorous smell and the "lesion now appears to be 'exploding' for lack of better words, definitely macerated." The request for inpatient urology and oncology evaluation and treatment was approved.

56. The GOVERNMENT failed to arrange for this evaluation with the treating doctors that were familiar with CASTANEDA'S condition, Dr. Wilkinson and/or Dr. Masters. Instead, ICE brought CASTANEDA to the emergency room at Scripps Mercy Chula Vista on July 13, 2006. This ultimately delayed CASTANEDA'S treatment further. CASTANEDA was examined at the Scripps emergency room by Juan Tovar, M.D., who noted a 1.5 cm. by 2 cm. fungating lesion on his penis with discharge but no lymphadenopathy, and made arrangements for admission to the hospital. His impression was: "penile mass, rule out cancer, versus infectious etiology."

57. HUNTING, a Scripps urologist, performed a very brief examination of CASTANEDA on July 13, 2006. He did not obtain CASTANEDA'S prior family history of cancer and believed CASTANEDA'S lesion was "probably condyloma." (genital warts). HUNTING referred him back to his "primary treating urologist" (Dr. Masters), rather than admit him to the hospital on an emergent basis. As a result, a circumcision and biopsy were not performed at Scripps to rule out cancer.

58. On July 17, 2006, Walker again examined CASTANEDA, noting that the penile lesion had grown and he had severe phimosis, bleeding, drainage and foul odor. Walker documented that he spoke to Dr. Wilkinson and Dr. Masters, who both strongly recommended a circumcision and biopsy. He also documented that he spoke to a charge nurse at Scripps who stated that the urologist diagnosed condyloma acuminate (genital warts), "no need for biopsy but will need a resection of the penis due to severe phimosis and gross condyloma."

59. Walker submitted CASTANEDA for early release on July 18, 2006 to further CASTANEDA'S opportunities for testing and potential treatment, due to the Scripps emergency room's failure to perform testing. The GOVERNMENT apparently denied this request and CASTANEDA was not released at that time.

60. On July 26, 2006, David Lusche ("Lusche"), a physician's assistant at SDCF, documented that he

explained to CASTANEDA "that while a surgical procedure might be recommended long-term, that does not imply that the federal Government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight." He also noted that his interaction with CASTANEDA "was conversational and calm, not confrontational."

61. On July 28, 2006, CASTANEDA filed a grievance against Lusche. That grievance was also denied. Lusche completed the Grievance Officer's Report and wrote: "I have met with Mr. Castaneda and explained that the urologist informed us that surgery at this point is elective in nature. As such the federal Government will not approve this (elective) surgery. We will continue to monitor Mr. Castaneda's status at his request using the sick call system."

62. On August 9, 2006, CASTANEDA was again examined by Lusche. Lusche noted that CASTANEDA's foreskin was inflamed and that there was a whitish growth approximately 8 mm. in diameter noted at the inferior margin of the foreskin. Lusche again denied CASTANEDA'S request for surgery as elective. He documented that CASTANEDA "expressed understanding, but calmly stated he does not agree with the decision."

63. On August 10, 2006, CASTANEDA again requested a biopsy via sick call slip. On August 11, 2006, Walker submitted a TAR form requesting "biopsy lesion on penis, surgical correction of glans penis, circumcision, by Dr. Robert Masters.

64. On August 22, 2006, almost five months after Walker's recommendation for a urology consult, CASTANEDA was taken to see Dr. Robert Masters, M.D. Dr. Masters observed the lesion and concluded that CASTANEDA had genital warts and might have urethral condylomata (i.e., genital warts inside of his urethra). Dr. Masters determined that CASTANEDA was in need of a circumcision, which would relieve the "ongoing medical side effects of the lesion including infection and bleeding" and would provide a biopsy for further analysis.

65. Dr. Masters' report to Walker stated: "We will arrange for admission for circumcision at a local hospital. My principal hospital is Sharp Memorial."

66. The GOVERNMENT denied CASTANEDA treatment and he was never brought to the hospital for biopsy and circumcision pursuant to Dr. Masters' order. Walker documented his conversation with Dr. Masters on August 22, 2006. Walker characterized Dr. Masters as stating that the "elective procedures this patient may need in the future are cytoscopy and circumcision." Walker did not document Dr. Masters' conclusion that cancer needed to be ruled out via biopsy and his offer to admit CASTANEDA for treatment at Sharp Memorial Hospital. Despite Walker's continued use of the term "elective," that word does not appear anywhere in Dr. Masters' or Dr. Wilkinson's reports, the only specialist physicians who had documented performing a full examination of CASTANEDA.

67. On August 24, 2006, Walker told CASTANEDA that "according to policy," the GOVERNMENT would prevent him from having a circumcision with a cystoscopy because it was "elective." Again, Walker documented that release for medical reasons would be discussed with the medical team so that CASTANEDA could pursue treatment, surgery, and follow up. Nevertheless, the GOVERNMENT did nothing to treat the problem and did not permit CASTANEDA to seek treatment on his own.

68. On August 26, 2006, CASTANEDA was seen by medical staff because of "complaints of a stressful situation regarding his medical status, being unable to sleep at night as ICE won't allow surgical operation for the lesion on penis." He was then prescribed Diphenhydramine, an antihistamine.

69. On August 28, 2006, CASTANEDA again requested treatment at sick call because he had stress and could not sleep. He attributed the stress to the chronic medical problems which the GOVERNMENT refused to correct. He was prescribed Trazodone, a psychoactive compound with sedative and anti-depressant properties, and a psychology consult, which he apparently never received. GOVERNMENT doctors were apparently indifferent to one of the well known side effects of Trazodone: priapism, a prolonged and painful erection in males.

70. On August 30, 2006, CASTANEDA received a memo from GONSALVES the Health Services Administrator at SDCF. The memo informed CASTANEDA

that: "the off site specialist you were referred to for your medical condition reports that any surgical intervention for the condition would be elective in nature. An independent review by our medical team is in agreement with the physician's assessment. The care you are currently receiving is necessary, appropriate and in accordance with our policies."

71. This conclusion is directly contradicted by Dr. Wilkinson and Dr. Masters' reports and by the GOVERNMENT'S TAR forms that specifically documented the off-site specialists' recommendations for surgical intervention and diagnostic biopsy.

72. On September 8, 2006, CASTANEDA was seen by Joanne Galano, RN, who received a sick call request stating, "I have a lot (sic) pain and I'm having discharge." She noted that 800 mg. of Ibuprofen was having no effect on his pain, he was having white discharge at night, and documented that "It's getting worse. It's like genital warts, but they're getting bigger."

73. On September 12, 2006, CASTANEDA stated again, via a sick call request, that he was having more penile lesion discharge and discomfort.

74. On September 14, 2006, Cindy Butler, RN, documented that CASTANEDA complained that: "My situation is getting worst and worst! I'm suffering pain, I cannot sleep because of the pain. Also the discharge does not stop nor the bleeding. It smells really bad! States that the antibiotic prescribed two days ago is not effective now, nor has it ever been in the

past." The GOVERNMENT still did nothing to treat the problem.

75. On September 18, 2006, the GOVERNMENT denied CASTANEDA'S request to be prescribed amoxicillin,

76. On September 26, 2006, Walker examined CASTANEDA'S penis and noted "another condyloma type lesion is forming and foul odor emitting from uncircumcised area with mushroomed wart." Apparently, Walker discussed releasing CASTANEDA to obtain medical care, but was denied by ICE because CASTANEDA was a "mandatory hold due to legal status."

77. On October 17, 2006, the medical staff was informed by the detention center's personnel that CASTANEDA was bleeding from his penis and had blood on his underwear.

78. On October 23, 2006, Walker submitted a TAR for surgery, which was pending. On October 25, 2006, the TAR request was denied because a DIHS Staff Physician stated that "circumcisions are not a *covered benefit.*"

79. The October 25 TAR form erroneously stated that "Patient has been seen by local urologist and oncologist and both are not impressed of possible cancerous lesions, however, there is an elective component to having the circumcision completed." This conclusion contradicted the July 13, 2006 TAR form, which documented that Dr. Wilkinson, the oncologist,

and Dr. Masters, the urologist, both "strongly recommended . . . surgical intervention via biopsy/ exploration" to rule out cancer via biopsy. This conclusion is also contradicted by the doctors' reports.

80. The October 25 TAR Form also documented that ICE authorities denied CASTANEDA'S request for release to seek medical care. It stated that CASTANEDA "is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite a while." This document shows that high-ranking GOVERNMENT authorities were aware CASTANEDA needed treatment and knew he would be unable to receive it in the foreseeable future.

81. On or about October 29, 2006, Walker told CASTANEDA that multiple requests to Washington, D.C. seeking authorization for surgery had been denied.

82. On November 9, 2006, Cindy Butler, RN, documented that CASTANEDA'S "symptoms have worsened. States he feels a constant pinching pain, especially at night. States he constantly has blood and discharge on his shorts. . . . Also complains of a swollen rectum which he states make bowel movements hard." In response to these complaints, he was prescribed milk of magnesia and docusate sodium, a laxative. CASTANEDA was informed that the TAR was "in place for surgery and is pending approval", despite the fact that the TAR request was denied two weeks before.

83. On November 14, 2006, CASTANEDA was seen by Lusche, who documented that Castaneda complained of a new, second lesion on the underside of his penis and he requested assistance to obtain more fresh underwear.

84. On November 15, 2006, the medical records document that the penile lesion was growing and that CASTANEDA could not stand and urinate because the urine "sprays everywhere." Lusche's examination documented a genital wart that was white in color and moist in appearance, approximately 2.5 cm. in diameter, and noted light pink stains in CASTANEDA'S underwear. Lusche treated this condition by making request for seven pairs of clean boxer shorts weekly.

85. CASTANEDA was transferred from SDCF on November 17, 2006. The "Medical Summary of Federal Prisoner/Alien in Transit" sheet, signed by Cindy Butler, listed no "current medical problems" and listed Trazodone as the only prescribed medication, with no medication for pain or antibiotics.

86. On November 23, 2006, CASTANEDA was examined at the LA/Santa Ana Staging area and was noted to have "other penile anomalies."

87. CASTANEDA was booked into San Pedro on November 24, 2006. On information and belief, CASTANEDA'S medical records were transferred with him and were provided to medical personnel at San Pedro.

88. On or about December 1, 2006, CASTANEDA filed a sick call slip at San Pedro complaining of pain, bleeding and discharge from his penis.

89. On or about December 3, 2006, CASTANEDA filed two more sick call slips complaining about his continuing pain, bleeding and discharge. CASTANEDA also requested a clean set of blankets because he had soiled his original sheets with blood and discharge from his penis.

90. ACLU National Prison Project ("ACLU") attorneys became involved in CASTANEDA'S case on or about December 5, 2006. The ACLU sent a letter to multiple SDCF and Health Services Administration ("HSA") officials, recounting CASTANEDA'S medical history since entering ICE custody. The letter fully informed these officials of the situation, including that "Mr. Castaneda, who has a strong family history of cancer, legitimately fears that his long term health is being jeopardized by the lack of appropriate medical care he continues to receive in ICE custody. In the short term, Mr. Castaneda continues to experience severe pain, bleeding, and discharge." Among other requests, the letter asked for confirmation that arrangements had been made to appropriately treat CASTANEDA.

91. It appears that a TAR form was filed sometime on or about December 5, 2006, seeking a second professional opinion and follow up due to the degree of phimosis and hypospadia, stating "he should have a biopsy of this lesion as well to ensure its status."

92. The TAR was approved on December 5, 2006 for "urology consult only. Please submit treatment plan and clinical assessment if other care recommended." The TAR request sought a consultation with Lawrence Greenberg, M.D., because of a "history of severe HPV infection causing large, painful, penile warts, has bleeding and pain from the lesions. May also have an underlying structural deformity of penis."

93. As a result of the ACLU's advocacy, CASTANEDA was transported to the office of Lawrence S. Greenberg, M.D. on December 14, 2006. Dr. Greenberg reviewed CASTANEDA'S medical records, which were provided to him by an ICE officer, and then physically examined CASTANEDA's penis. Dr. Greenberg noted the blood and discharge and asked why CASTANEDA had not had surgery.

94. Dr. Greenberg informed CASTANEDA that he required a circumcision and remarked that CASTANEDA'S penis was a "mess." At the end of the visit, Dr. Greenberg stated that CASTANEDA required surgery and that he would send a fax recommendation to the doctor at San Pedro later that day.

95. When CASTANEDA left Dr. Greenberg's office he was transported back to San Pedro and was told that he would be seen by the medical staff either on December 15 or December 18.

96. CASTANEDA was not seen by the medical staff on either December 15 or 18, despite filing a sick

call slip on December 18 that reported a lump that had developed in his groin over the weekend.

97. On December 19, an ACLU attorney telephoned various officials regarding CASTANEDA'S medical care. The December 5 letter was again emailed to the Officer in Charge at that time. The Officer in Charge replied to the email, stating: "I am in receipt of your request. I am currently dealing with a couple serious issues this date. I will however, consult with the affected departments tomorrow and see what can be done concerning your request."

98. On December 26, 2006, Shelly Hollandsworth, RN, documented CASTANEDA'S complaint of blood coming from his penis. Although ICE had received Dr. Greenberg's report by December 15, Nurse Hollandsworth had no knowledge of the report. CASTANEDA was provided no treatment, despite Dr. Greenberg's report, the email from the ACLU and CASTANEDA'S disturbing medical presentation, which included a lump in his groin.

99. On January 11, 2007, CASTANEDA was again seen by Nurse Hollandsworth who still reported a "knowledge deficit related to follow up," Danielle Didonna also authored a note on January 11, stating that CASTANEDA had been seen by Dr. Greenberg "who recommends advanced urology specialty care. Patient must have a biopsy and further treatment recommendations made." She also documented that CASTANEDA was in severe pain that was not being alleviated by pain medication. She

documented that CASTANEDA was to have another specialty evaluation with biopsy. The assessment was to rule out carcinoma of penis secondary to HPV infection.

100. On January 19, 2007, the ACLU faxed another letter and request for medical treatment on CASTANEDA'S behalf to MOLINAR, Norma Bouales-Garibei, HENNEFORD, and MAZUR, higher level GOVERNMENT officials.

101. On January 24, 2007, forty days after Dr. Greenberg's surgical consult order, the records reflect that a TAR form requesting a specialty urology consult with Asghar Askari, M.D. was verbally approved by Dr. Collins, presumably an ICE doctor.

102. On January 25, 2007, CASTANEDA was seen by Dr. Askari, who diagnosed a fungating penile lesion with possible left lymphadenopathy that was "most likely penile cancer." He ordered a penile biopsy on an out-patient basis under general anesthesia. He communicated these findings to the GOVERNMENT.

103. On January 29, 2007, the ACLU again wrote to ICE officials, urging them to provide CASTANEDA the care that had been ordered for him for the past ten months. A biopsy was finally scheduled for CASTANEDA in February.

104. Instead of providing the treatment ordered by Dr. Askari, ICE released CASTANEDA from custody on February 5, 2007. Presumably, ICE released

CASTANEDA to avoid having to pay for the biopsy that was originally recommended by Walker on CASTANEDA'S first day of admission in March 2006, by Dr. Wilkinson on June 7, 2006, by Dr. Masters on August 22, 2006, and by Dr. Greenberg on December 14, 2006. The GOVERNMENT ultimately released CASTANEDA without ever providing the simple and inexpensive procedure essential to diagnosing a serious and life-threatening medical problem.

105. After his release from ICE custody, CASTANEDA went to the emergency room of Harbor-UCLA Hospital in Los Angeles ("Harbor-UCLA") on February 8, 2007. He was scheduled for a biopsy in the Urology Clinic on February 12, 2007, and was admitted on February 13 with a diagnosis of squamous cell carcinoma of the penis.

106. His penis was amputated on February 14, 2007, Valentine's Day.

107. The partial penectomy left CASTANEDA with a 2 cm. stump. The remaining 8 cm. sample of his penis was sent to pathology, which revealed that CASTANEDA had "Invasive Squamous Cell Carcinoma (5.5 cm in size), keratinizing type." The tumor extended 4.5 cm. in depth.

108. Harbor-UCLA has confirmed that CASTANEDA has metastatic cancer that has spread to his groin or inguinal region in the form of a large nodal mass that measured approximately 7 cm. as of March 14, 2007. This fast growing cancer was notably increased in size from a February 8, 2007 scan.

109. CASTANEDA has been undergoing chemotherapy at Harbor-UCLA with the hope of shrinking the inguinal tumor to a size where surgical removal is a viable option. His prognosis is poor and his life is in imminent jeopardy. He has been diagnosed with terminal cancer.

110. The UNITED STATES and its agents/employees provided care based on a DIHS Detainee Covered Services Package providing that "benefits are provided for emergency care and not elective or non-emergent or pre-existing conditions. The definition of an emergency is 'a condition that poses an imminent threat to life, limb, hearing, or sight.'"

111. The DIHS policy differs from the medical policies that govern convicted criminals in the custody of the United States Department of Justice, Federal Bureau of Prisons. Convicted criminals are not faced with the presumption that their "pre-existing" or "non-emergent" medical needs will not be treated.

FIRST CAUSE OF ACTION
Federal Tort Claims Act Claim against
THE UNITED STATES OF AMERICA
for Medical Negligence
(Non Jury Claim)

112. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

113. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the Federal Tort Claims Act ("FICA"), 28 U.S.C. § 2674.

114. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

115. At all material times, the UNITED STATES carelessly and negligently cared for and treated Plaintiff while he was detained at SDCF and San Pedro, and provided medical care in a careless and negligent manner and also acted with deliberate indifference to Plaintiff's known serious medical condition. The UNITED STATES carelessly and negligently treated, managed, monitored and supervised Plaintiff's condition during his detention from March 27, 2006 until February 5, 2007. The UNITED STATES' negligent care and negligent failure to administer appropriate care directly and proximately resulted in certain injury and disability to Plaintiff, all to his general damage.

116. As a direct and proximate result of the UNITED STATES' negligence, Plaintiff suffered certain injuries, including the amputation of his penis and development of metastatic cancer, and other injuries presently unknown and undiagnosed. He has

also suffered and will continue to suffer great physical, mental, and emotional pain Plaintiff has also been impaired in his mental and physical capacity, all of which will result in permanent disability to Plaintiff, all to his general damage.

117. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

SECOND CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Establishment of Unconstitutional Policy for Provision of Medical Care to Immigration Detainees
(Non-Jury Claim)

118. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

119. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674.

120. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to

the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

121. At all material times, the UNITED STATES failed to use reasonable care in the establishment of policies and directives for the provision of medical care to immigration detainees. The policies and directives for the provision of medical care were unreasonable and inadequate in part because these policies violated clearly established constitutional law.

122. As a direct and proximate result of the UNITED STATES' negligence in creating and establishing these inadequate policies and directives, Plaintiff suffered certain injuries, including the amputation of his penis and development of metastatic cancer, and other injuries presently unknown and undiagnosed. He has also suffered and will continue to suffer great physical, mental and emotional pain. Plaintiff has also been impaired in his mental and physical capacity, all of which will result in permanent disability to Plaintiff, all to his general damage.

123. As a further direct and proximate result of the negligent, acts. omissions and conduct of the UNITED STATES and its agents, and the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and

other medical care and treatment in an amount not now known to him.

THIRD CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Application of Policy for Provision of Medical Care to Immigration Detainees (Non-Jury Claim)

124. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

125. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violate the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674.

126. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

127. At all material times, the UNITED STATES carelessly and negligently implemented and/ or applied the ICE detainee medical care policy such that the Plaintiff's request for a diagnostic biopsy, a simple and inexpensive procedure to rule out a life threatening disease, was denied as elective. in addition to qualifying as negligence, the UNITED

STATES' action violated the Plaintiff's constitutional right to adequate and reasonable medical care.

128. As a direct and proximate result of the UNITED STATES' negligence, Plaintiff suffered certain injuries, including the amputation of his penis and development of metastatic cancer, and other injuries presently unknown and undiagnosed. He has also suffered and will continue to suffer great physical, mental and emotional pain. Plaintiff has also been impaired in his mental and physical capacity, all of which will result in permanent disability to Plaintiff, all to his general damage.

129. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

FOURTH CAUSE OF ACTION
FTCA Claim against UNITED STATES for Intentional Infliction of Emotional Distress (Non-Jury Claim)

130. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

131. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and

San Pedro violated the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674.

132. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

133. At all material times, the UNITED STATES' treatment of CASTANEDA during his detention, including but not limited to the failure to provide him reasonable and humane medical care, was conducted in an extreme and outrageous manner with the knowledge that Plaintiff was unable to care for himself during his incarceration.

134. The UNITED STATES acted intentionally or with the reckless disregard of causing emotional distress.

135. As a direct and proximate result of the unlawful conduct of the UNITED STATES and its agents, Plaintiff has suffered special damages, including but not limited to past and future loss of income, benefits, medical expenses, and other damages to be proven at the time of trial.

136. As a direct and proximate result of the unlawful conduct of the UNITED STATES and its agents, Plaintiff has suffered general damages, including but not limited to shock, embarrassment,

physical distress and injury, humiliation, severe emotional distress, stress and other damages to be proven at the time of trial.

137. Plaintiff is informed and believes, and thereon alleges, that the UNITED STATES and its agents committed the acts herein alleged maliciously, fraudulently and oppressively in conscious disregard for Plaintiff's rights and that the conduct of UNITED STATES and its agents was a substantial factor in causing Plaintiff's emotional distress.

FIFTH CAUSE OF ACTION
Bivens Claim for Inadequate Medical Care against all individual Defendants (except HUNTING) and DOES 1-10

138. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

139. This is a claim against all Defendants who were agents of the UNITED STATES and named in their individual capacity, excluding HUNTING ("INDIVIDUAL DEFENDANTS"), and DOES 1-10.

140. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated Plaintiff's right to adequate medical care under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution by failing to treat Plaintiff's known serious medical condition.

141. At all material times, the INDIVIDUAL DEFENDANTS and DOES 1-10 were aware that CASTANEDA had a growth on his penis that required a biopsy to rule out penile cancer, a very serious and life-threatening disease.

142. The INDIVIDUAL DEFENDANTS and DOES 1-10 purposefully denied CASTANEDA essential medical care for a known serious medical condition, despite knowledge that CASTANEDA's mother had died from cancer at age thirty-nine and that CASTANEDA was not going to be released from custody to treat the life-threatening condition in the foreseeable future.

143. The actions of The INDIVIDUAL DEFENDANTS and DOES 1-10 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering "medical care" to CASTANEDA were so far below the acceptable standard that the INDIVIDUAL DEFENDANTS and DOES 1-10 could not have been making a "medical" judgment in their decision to deny CASTANEDA a very basic and inexpensive diagnostic procedure to rule out a life-threatening disease.

144. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny CASTANEDA medical care was not based on a medical reason, but rather economic and/or other

constitutionally impermissible reasons unrelated to the provision of medical services.

145. Each of the INDIVIDUAL DEFENDANTS and DOES 1-10 were acting under color of law by exercising power made possible because the Defendants were clothed with the authority of federal law.

146. The INDIVIDUAL DEFENDANTS and DOES 1-10 acted with deliberate indifference to the serious health needs protected by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, subjected Plaintiff to dangerous and debasing conditions of confinement, and violated basic fundamental rights to safe and humane confinement. The inhumane conditions of confinement caused Plaintiff medical injuries as alleged in this Complaint. The conduct constituted cruel and unusual punishment and a violation of due process.

147. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated clearly established law by failing to adequately treat and/or diagnose a known serious medical condition.

148. As a result of the Defendants' constitutional violations of Plaintiff's rights, Plaintiff sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement which is permanent; and

c. Economic losses consisting of past and future medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

149. The conduct of each of the INDIVIDUAL DEFENDANTS and DOES 1-10 constitutes a reckless or callous disregard of Plaintiffs constitutional right to adequate medical care, entitling Plaintiff to punitive damages.

SIXTH CAUSE OF ACTION
***Bivens* Claim for Equal Protection Violations against all INDIVIDUAL DEFENDANTS (except HUNTING) and DOES 1-10**

150. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

151. This is a claim against all Defendants who were agents of the UNITED STATES and named in their individual capacity, excluding HUNTING ("INDIVIDUAL DEFENDANTS"), and DOES 1-10.

152. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated Plaintiff's right to equal protection under the Fifth and Fourteenth Amendments of the United States' Constitution by failing to treat Plaintiff's known serious medical condition due to his immigration status, without a rational basis to do so.

153. At all material times, the INDIVIDUAL DEFENDANTS and DOES 1-10 were aware that CASTANEDA had a growth on his penis that required a biopsy to rule out penile cancer, a very serious and life-threatening disease.

154. The INDIVIDUAL DEFENDANTS and DOES 1-10 purposefully denied CASTANEDA essential medical care for a known serious medical condition, despite knowledge that CASTANEDA's mother had died from cancer at age thirty-nine and that CASTANEDA was not going to be released from custody to treat the life-threatening condition in the foreseeable future.

155. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering ""medical care" to CASTANEDA were so far below the acceptable standard that the INDIVIDUAL DEFENDANTS and DOES 1-10 could not have been making a "medical" judgment in their decision to deny CASTANEDA a very basic and inexpensive diagnostic procedure to rule out a life-threatening disease.

156. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny CASTANEDA medical care was not based on a medical reason, but rather economic and/or other

constitutionally impermissible reasons unrelated to the provision of medical services.

157. Each of the INDIVIDUAL DEFENDANTS and DOES 1-10 were acting under color of law by exercising power made possible because the Defendants were clothed with the authority of federal law.

158. The INDIVIDUAL DEFENDANTS and DOES 1-10 acted in violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments of the United States Constitution by discriminating against CASTANEDA based on his immigration status with no rational basis to do so. In that regard, the INDIVIDUAL DEFENDANTS and DOES 1-10 failed to approve a simple and inexpensive diagnostic procedure for CASTANEDA because he was an immigration detainee, while having a policy to provide this type of care to other federal prisoners who were not in the same class as CASTANEDA.

159. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated clearly established law by violating CASTANEDA's rights to equal protection under the United States Constitution.

160. As a result of the Defendants' constitutional violations of Plaintiff's rights, Plaintiff sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement which is permanent; and

c. Economic losses consisting of past and future medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

161. The conduct of each of the INDIVIDUAL DEFENDANTS and DOES 1-10 constitutes a reckless or callous disregard of Plaintiff's constitutional right to Equal Protection, entitling Plaintiff to punitive damages.

SEVENTH CAUSE OF ACTION
42 U.S.C. § 1983 Claim against S. PASHA, M. SHERIDAN, A. LEOUNG and DOES 1-10

162. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

163. This claim is brought under 42 U.S.C. § 1983. S. PASHA, A. LEONG, M. SHERIDAN, and DOES 1-10, employees and/or agents of CALIFORNIA, violated Plaintiff's right to adequate medical care under the Eighth and Fourteenth Amendments of the United States Constitution by failing to treat Plaintiff's known serious medical condition.

164. Each of these Defendants was acting under color of law by exercising power made possible because the Defendants were clothed with the authority of state law.

165. Each of these Defendants acted with deliberate indifference to the serious health needs protected by the Eighth and Fourteenth Amendments to the United States Constitution. They had actual knowledge that CASTANEDA had a 2cm by 2cm growth on his penis that required a biopsy to rule out cancer. In spite of this documented knowledge, they denied him the biopsy required to rule out cancer. This conduct constituted cruel and unusual punishment and a violation of due process.

166. DOES 1-10 violated clearly established law by acting with deliberate indifference in failing to adequately treat and/or diagnose a known serious medical condition.

167. As a result of these Defendants' constitutional violations of Plaintiff's rights, Plaintiff sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement which is permanent; and

c. Economic losses consisting of past and future medical and health care expenses and loss of future earning capacity.

168. The conduct of each of these Defendants constitutes a reckless or callous disregard of the

Plaintiffs constitutional rights, entitling Plaintiff to punitive damages.

EIGHTH CAUSE OF ACTION
Medical Negligence against DOES 1-10

169. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

170. Defendants DOES 1 through 10, inclusive, are sued under fictitious names because their true names, involvement, and capacities, whether individual, associate, corporate or governmental, are not now known to Plaintiff. This action is based on Cal. Govt Code 845.6, and alleges that the Defendants failed to treat a serious and obvious medical condition that required immediate care. These allegations are in addition to a state law medical negligence claim. Based on information and belief, Plaintiff alleges that each of these Defendants are negligent or responsible in some manner for the events alleged in this Complaint, either as manufacturers, suppliers, sellers, distributors, physicians, surgeons, anesthetists, nurses, other medical practitioners, pharmacists, hospitals or hospital attendants, ambulance companies or attendants, or otherwise. Plaintiff is uncertain as to the manner or function of these Defendants, whether as manufacturers, suppliers, sellers, distributors, physicians, surgeons, anesthetists, nurses, other medical practitioners, pharmacists, hospitals or hospital attendants, ambulance companies or attendants, or

otherwise, and Plaintiff will ask leave to amend this Complaint to specifically name these Defendants when such names, capacities, functions, occupations and businesses of these Defendants have been more fully ascertained.

171. Based on information and belief, Plaintiff alleges that, at all times herein mentioned, each of these Defendants were the agents, servants and employees of each of the other Defendants named in this Complaint, and at all material times were acting within the course and scope of their agency, service and employment.

172. At all times herein mentioned, Defendants DOES 1 through 5, inclusive, were and now are corporate and/or public entities duly organized and existing under the laws of the State of California, and were at all times engaged in owning, operating and maintaining hospitals and other medical facilities to treat detainees in the State of California.

173. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the Defendants pursuant to California Code of Civil Procedure § 364 and Government Code § 910.

174. At all times and places mentioned herein, each of these Defendants carelessly and negligent cared for and treated Plaintiff for his above-described medical condition and his general medical condition, and each of these Defendants provided hospital, medical, emergency, anesthetic, nursing, laboratory,

x-ray, and ambulance services, care, and attention in a careless and negligent manner. Each of these Defendants carelessly and negligently treated, managed, monitored and supervised Plaintiff's condition during his detention by the State of California during 2005 and 2006, which, among other things, directly and proximately resulted in certain injury and disability to Plaintiff, all to his general damage.

175. As a direct and proximate result of these Defendants' negligence and carelessness, Plaintiff suffered certain injuries, including the amputation of his penis and development of metastatic cancer, and other injuries presently unknown and undiagnosed, and he has suffered and will continue to suffer great physical, mental and emotional pain As a further direct and proximate result of the negligent acts, omissions and conduct of these Defendants and of the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

NINTH CAUSE OF ACTION
Medical Negligence against HUNTING and DOES 1-10

176. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

177. HUNTING was, at all material times, a medical doctor licensed by the State of California and practicing medicine in California.

178. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the Defendants pursuant to California Code of Civil Procedure § 364.

179. ICE brought CASTANEDA to the emergency room at Scripps Mercy Chula Vista on July 13, 2006. CASTANEDA was examined at the Scripps emergency room by Juan Tovar, M.D., who noted a 1.5 cm. by 2 cm. fungating lesion on his penis with discharge but no lymphadenopathy, and made arrangements for admission to the hospital. His impression was: "penile mass, rule out cancer, versus infectious etiology."

180. HUNTING, a Scripps urologist, performed a very brief examination of CASTANEDA on July 13, 2006. He did not obtain CASTANEDA'S prior family history of cancer and believed CASTANEDA'S lesion was "probably condyloma" (genital warts). HUNTING declined to treat him and made the erroneous assumption that CASTANEDA'S lesion was not cancerous without the benefit of a diagnostic biopsy. As a result of HUNTING'S intervention, a circumcision and biopsy were not performed at Scripps to rule out cancer.

181. At all times and places mentioned herein, each of these Defendants carelessly and negligently cared for and treated Plaintiff for his above-described

medical condition and his general medical condition, and each of these Defendants provided hospital, medical, emergency, anesthetic, nursing, laboratory, x-ray, and ambulance services, care, and attention in a careless and negligent manner. Each of these Defendants carelessly and negligently treated, managed, monitored and supervised Plaintiff's condition in July 2006 which, among other things, directly and proximately resulted in certain injury and disability to Plaintiff, all to his general damage.

182. As a direct and proximate result of these Defendants' negligence and carelessness, Plaintiff suffered certain injuries, including the amputation of his penis and development of cancer, and other injuries presently unknown and undiagnosed, and he has suffered and will continue to suffer great physical, mental and emotional pain.

183. As a further direct and proximate result of the negligent acts, omissions and conduct of these Defendants and of the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

JURY TRIAL DEMAND

Plaintiff demands a jury trial to resolve all claims brought herein except for the claim against THE UNITED STATES OF AMERICA under the FICA, which must be adjudicated by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that, after due proceedings, judgment be entered in favor of Plaintiff and against all Defendants, jointly and severally, and that this Court:

(a) Award Plaintiff all compensatory damages reasonable under the circumstances, including physical pain and suffering, mental anguish and emotional distress, disfigurement, medical expenses, loss of enjoyment of life, and any other compensatory damages, for each count alleged in the Complaint;

(b) Award Plaintiff punitive damages against all Defendants sued in their individual capacity (Plaintiff acknowledges that punitive damages are not available against the governmental entity defendants);

(c) Award Plaintiff reasonable attorneys' fees, expert fees, and court costs under 42 U.S.C. §1988 for the prosecution of his 42 U.S.C. § 1983 claims;

(d) Award Plaintiff reasonable attorneys fees' and court costs under state law for the prosecution of his state law claims;

(e) Award Plaintiff legal interest on all damages awarded from the date of judicial demand until paid; and

(f) Award Plaintiff such other and further relief as this Court deems just and proper.

Dated this 5th day of February, 2008

By: /s/ Le Joyce L. Porter
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**UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA**

FRANCISCO CASTANEDA, Plaintiff, vs. THE UNITED STATES OF AMERICA, et al. Defendants.	Case No.: CV07-07241 DDP(JCx) **DECLARATION OF CLAUDIA MAZUR** [Filed Feb. 11, 2008]

I, CLAUDIA MAZUR, declare as follows:

1. I am a Registered Nurse (R.N.) licensed in Virginia and the District of Columbia.

2. During 2006, I was employed by Maximus, a private corporation, that subcontracted my services to STG International, another private corporation, that had a contract to provide services to the United States Department of Immigration Health Services (DIHS).

3. During 2006, I worked as an independent contractor for DIHS as a Case Manager in the Managed Care division. Part of my job duties and responsibilities required me to review requests from ICE facilities for immigration detainees who potentially required medical services from private medical providers outside of the DIHS system.

4. These requests came to me in the form of Treatment Authorization Request (TAR) forms. These forms were initially completed by the on-site medical providers treating the patient and generally contained a summary of the pertinent medical information related to the request for treatment. My job required me to review the TARs and determine if the detainee was eligible for the requested service; if there was sufficient clinical information to make a determination, and whether the request needed to be reviewed by a DIHS medical doctor.

5. I had the authority to issue an administrative denial. One example of this would be a denial for lack of sufficient information from the requesting ICE facility.

6. I had the authority to approve requests, but did not have the authority to deny a request based on medical necessity. All medical necessity denial decisions were made by one of the designated DIHS medical doctors.

7. Upon review of several of Francisco Castaneda's TAR Forms, I have a recollection of working on his case in 2006.

8. Based on review of some TAR forms provided to me, a TAR form was submitted for my review on or about March 29, 2006. The TAR requested a referral to urology and stated that "[m]ost likely will need to have biopsy of lesion done." I issued an administrative denial, seeking more information from the facility, to wit: why a biopsy was requested if they already knew it was genital warts; what type of family history of cancer Mr. Castaneda had; and why this was an emergent situation requiring a urology consult. (Exhibit 1: March 29, 2006 TAR Form).

9. On or about April 14, 2006, I received another TAR Form regarding Mr. Castaneda with the information I had requested on March 29. I was informed, through the TAR, that "patient is a 34 year old Hispanic male with a history of cancer. His mother died of pancreatic cancer at age 39 and his father died of massive MI at age 27. He presents with large lesion to the glans penis with maceration at its core. It does not appear to have a massive infection at this time, however, it does need assessing. Also, he has

severe phimosis that is causing him difficulty urinating, discomfort in general and he is not circumcised. This degree of phimosis and hypospadia needs a second professional opinion and follow up. He should have a biopsy of this lesion as well to insure its status. . . . " I provided this information to Chang Park, M.D., a DIHS doctor, and asked him to make the decision on whether to deny or approve the request for a urology consult. The TAR was given "pended" status at that time, awaiting Dr. Park's decision. (Exhibit 2: April 14, 2006 TAR)

10. On or about May 31, 2006, I approved a TAR for Mr. Castaneda, giving authorization for a lesion excision for a biopsy, and surgical correction of the penis, including circumcision, and pertinent surgical follow up. The Dialogue of Request portion of the TAR, received from the San Diego Correctional Facility, stated the following: "34 year old Hispanic male with strong family history of various cancers. Patient with macerated lesion to glans penis, RPR negative, HIV negative, lesion is becoming worse. Urology unable to see this patient, however lesion removal and biopsy is strongly recommended by a surgeon for lab study. Patient has been treated for possible infections to no avail. Lesion has foul odor. Also has severe hypospadias with 8/10 pain with urination and erection. Grossly uncircumcised. Strongly recommended lesion excision for biopsy, surgical correction of glans penis for severe hypospadias and circumcision, and pertinent

surgical follow up. Due to family history and patient discomfort the sooner the better." I approved the TAR. I do not recall whether I approved the TAR on my own or I discussed this TAR with Dr. Park or another DIHS medical doctor and approved the TAR following such a discussion. (Exhibit 3: May 31, 2006 TAR).

11. On or about July 12, 2006, I received another TAR form about Mr. Castaneda. The TAR request stated as follows: "34 year old Hispanic male with continued growing lesion to penis with severe phimosis, bleeding, and clear drainage from lesion area with foul odor. Spoke with Dr. Wilkinson, Oncologist 619-287-9910 and Dr. Masters, Urologist 619-226-8200 who both strongly recommend admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant, return f/u with oncology depending upon findings, and potential treatment or surgery of any malignant findings. Patient has been at this facility since 3-27-06, and states that he has had this lesion for about 3 years but noticed it worsened around January or February 2006. There is now bleeding, drainage, malodorous smell, and the lesion now appears to be "exploding" for lack of better words, definitely macerated. Request for urology and oncology inpatient eval and treatment with outpatient follow up." (Exhibit 4: July 12, 2006 TAR) Based on this information, and a telephone conversation with lieutenant Anthony Walker, an

ICE Physician's Assistant who was treating Mr. Castaneda, I approved the TAR, authorizing a trip to the local Emergency Room for evaluation and treatment.

12. I recall speaking with Lieutenant Walker sometime after the ER visit, and during that telephone call, we expressed surprise and disappointment that Mr. Castaneda was not admitted to the Hospital for treatment.

13. On or about October 19, 2006, I received another TAR on Mr. Castaneda, which stated: "34 year old El Salvadoran male with 3 year history of genital wart on uncircumcised penis. Patient has developed a moderate sized condyloma to the glans penis and another one is developing within the foreskin. Patient has subsequent infections, bleeding due to very tight foreskin, some dysuria but has been functioning in the past, and foul odor but no sign of infection. Patient has been seen by local oncologist and urologist and both are not impressed of possible cancerous lesion(s), however, there is an elective component to having the circumcision completed. Patient has been submitting several requests for sick call that when evaluated there is not much left to be done. Patient is demanding surgical treatment, but is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite a while." I referred the TAR to Neal Collins, M.D., a DIHS physician, for his further review and decision.

Dr. Collins made the decision to deny the TAR on or about October 25, 2006. The reason provided for the denial was that "circumcisions are not a covered benefit." (Exhibit 5: October 19, 2006 TAR)

14. Although I do not have an independent recollection of doing so in this case, my typical practice is to create a file to document the information reviewed and/or created whenever there is a denial for medical necessity. To the extent I had such a file relating to Mr. Castaneda, the file would have been maintained at DIHS and I do not have a copy of it. It was also a typical practice for me to communicate via email and telephone with DIHS physicians regarding TAR referrals that may result in denials, although I do not have an independent recollection of doing so in this case.

I declare under penalty of perjury under the laws of the State of California and Virginia that the foregoing is true and correct and is based on personal knowledge, my review of medical records, and my experience and education as a Registered Nurse, and that I am competent to testify as to the contents of this declaration and that this declaration was executed on February 6, 2008 in Virginia.

/s/ Claudia W. Mazur, Rn
CLAUDIA MAZUR, R.N.

[EXHIBIT 1]

Division of Immigration Health Services **Treatment, Authorization & Consultation Form**

(Filed Feb. 11, 2008)

SEND CLAIMS TO:
Immigration Health Services
1220 L Street, NW
PMB 468
Washington, DC 20005-4018
Phone: 1.800.479.0523
Fax: 1.866.475.9349

A separate treatment authorization request will be required for services beyond and outside the scope of the original authorization. Services rendered may not be paid without an approved authorization. All payment for services is subject to detainees' eligibility and custody. Unless otherwise specified, payment for DIHS' authorized health services is made in accordance with US Code Title 18, Part 3, Chapter 301, Sec. 4006. For all non-emergency authorized health services this TAR is valid for 30 days after the date of issue and cannot be used for health services rendered prior to the date of issue. All claims are subject to retrospective review. For further information regarding DIHS, payment policy and proper claim submission, please visit our website: www.inshealth.org" or contact the Immigration Health Services' Managed Care Branch at 1.888.718.8947, M-F 8AM-6PM EST.

Please ensure all claims include the Patient Identification Information and the Authorization number.

IMPRINT OF DETAINEE ID PLATE, COMPUTER LABEL OR COMPLETE BELOW:	
1. Name: Last, First CASTANEDA, FRANCISCO	1b Alias: Last, First
2. DOB: 02/10/1972	3. ID Number 094149233
4. Nationality: EL SALVADOR	5. Facility: Corr Corp of America, SD, CA 619.710.8347

AUTHORIZED ACTION:
Status: Denied TAR #: 20060328932900
Authorizer: Claudia Mazur, RN, CCM/Claudia Mazur, RN, CCM
Service Type: Non-Emergency
Referral Type: 11

To: (*Name and Phone to whom referral is being made*)

Dialogue of Request:
Cannot approve due to incomplete clinical information. Please resubmit a new TAR stating why a biopsy of the lesion is needed if you already know it is genital warts. What kind of family history of cancer are you referring to and why do you think this is an emergent situation requiring a Urology consult?

Updated by Claudia Mazur, RN, CCM on Wednesday, March 29, 2006

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34 yo Hispanic male with c/o genital warts and severe phimosis. Most likely will need to have biopsy of

lesion done. Pt is at risk for UTI. Pt family has history of cancer. Please send to urology. Do not have current urologist but will work on establishing a relationship.

Provisional Diagnosis:
V70 GENERAL MEDICAL EXAMINATION

Consultation Report:

TAR Appeals: To appeal a decision of DIHS to not authorize a service, a detention facility must submit a TAR Appeal through the TAR process and include the following information: a) "TAR Appeal", b) TAR number and other information from TAR being appealed, c) requested action, and d) justification for the requested action."

Instructions for Usage of Treatment Authorization And Consultation Form

Payment for services is contingent upon receipt of findings, recommendations and eligibility. To expedite payment for services rendered, please return medical, psychiatric or dental findings and recommendations immediately to the referral source following the instructions below. Provider or facility to which the detainee was referred will retain two copies of the completed report and return the Original Copy immediately upon completion of consultation with findings and recommendations to the referral source.

Original Copy – *Permanent Medical Record* and 2 copies are to be forwarded with detainee to referral source.

A. **Copy 1** *Provider or Facility Copy* – to be retained by provider or facility for own records.

B. **Copy 2** *Billing Copy* – to be attached to bill for service rendered and returned to the DIHS facility that authorized the service.

C. **Copy 3** *Pending Medical Record Copy* – should be retained at referral source and filed in the medical record until **Original Copy** has been returned with findings and recommendations. (**Copy 3** is to be removed from the medical record and destroyed upon receipt of the **Original Copy**).

Referral Type Descriptions:

Consult Only – Consultative health services only that are consistent with the consultative Provider's specialty and detainee's medical condition.

Emergency Room – Health services consistent with an Emergency Room setting and detainee's specified medical condition. In cases where an inpatient admission may be medically necessary following an initial Emergency Room visit; a new TAR must be submitted by the detainee's custodial facility.

Medical Appointment (Not a consult) – Health services consistent with the Provider's specialty and detainee's specified medical condition.

Medical Lab/Test – Labs and/or Tests consistent with the detainee's specified medical condition.

Inpatient Hospitalizations – Health services consistent with an inpatient hospitalization and the detainee's specified medical condition.

Dental Services – Health services consistent with a dental Provider's specialty and detainee's specified medical condition.

Non-Formulary Medications – Any medications not included on DIHS' designated formulary

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[EXHIBIT 2]

Division of Immigration Health Services **Treatment, Authorization & Consultation Form**

(Filed Feb. 11, 2008)

SEND CLAIMS TO:
Immigration Health Services
1220 L Street, NW
PMB 468
Washington, DC 20005-4018
Phone: 1.800.479.0523
Fax: 1.866.475.9349

A separate treatment authorization request will be required for services beyond and outside the scope of

the original authorization. Services rendered may not be paid without an approved authorization. All payment for services is subject to detainees' eligibility and custody. Unless otherwise specified, payment for DIHS' authorized health services is made in accordance with US Code Title 18, Part 3, Chapter 301, Sec. 4006. For all non-emergency authorized health services this TAR is valid for 30 days after the date of issue and cannot be used for health services rendered prior to the date of issue. All claims are subject to retrospective review. For further information regarding DIHS, payment policy and proper claim submission, please visit our website: www.inshealth.org" or contact the Immigration Health Services' Managed Care Branch at 1.888.718.8947, M-F 8AM-6PM EST.

Please ensure all claims include the Patient Identification Information and the Authorization number.

IMPRINT OF DETAINEE ID PLATE, COMPUTER LABEL OR COMPLETE BELOW:	
1. Name: Last, First CASTANEDA, FRANCISCO	1b Alias: Last, First
2. DOB: 02/10/1972	3. ID Number 094149233
4. Nationality: EL SALVADOR	5. Facility: DIHS SD-CC of Am, CA 619.710.8347

AUTHORIZED ACTION:
Status: Pended TAR #: 20060414169100
Authorizer: Chang Park, MD/
CCM/Claudia Mazur, RN, CCM
Service Type: Non-Emergency
Referral Type: 11

To: *(Name and Phone to whom referral is being made)*

Dialogue of Request:
As previously stated, this pt is a 34yo hisp. male with family history of CANCER. His mother died of pancreatic CA at age 39 and his father died of massive MI at age 27. He presents with large lesion to the glans penis with maceration at its core. It does not appear to have a massive infection at this time, however it does need assessing. Also, he has a severe phimosis that is causing him difficulty urinating, discomfort in general and he is not circumcised. This degree of phimosis and hypospadia needs a second professional opinion and follow-up. He should have a biopsy of this lesion as well to ensure its status. Please re-evaluate this request and if there are further questions, do not hesitate to contact me. Thank you

Provisional Diagnosis:
752.61 HYPOSPADIAS

Consultation Report:

[redacted]

TAR Appeals: To appeal a decision of DIHS to not authorize a service, a detention facility must submit a

TAR Appeal through the TAR process and include the following information: a) "TAR Appeal", b) TAR number and other information from TAR being appealed, c) requested action, and d) justification for the requested action."

Instructions for Usage of Treatment Authorization And Consultation Form

Payment for services is contingent upon receipt of findings, recommendations and eligibility. To expedite payment for services rendered, please return medical, psychiatric or dental findings and recommendations immediately to the referral source following the instructions below. Provider or facility to which the detainee was referred will retain two copies of the completed report and return the **Original Copy** immediately upon completion of consultation with findings and recommendations to the referral source.

Original Copy – *Permanent Medical Record* and 2 copies are to be forwarded with detainee to referral source.

A. **Copy 1** *Provider or Facility Copy* – to be retained by provider or facility for own records.

B. **Copy 2** *Billing Copy* – to be attached to bill for service rendered and returned to the DIHS facility that authorized the service.

C. **Copy 3** *Pending Medical Record Copy* – should be retained at referral source and filed in the medical record until **Original Copy** has been returned with findings and recommendations. (**Copy 3** is to be removed from the medical record and destroyed upon receipt of the **Original Copy**).

Referral Type Descriptions:

Consult Only – Consultative health services only that are consistent with the consultative Provider's specialty and detainee's medical condition.

Emergency Room – Health services consistent with an Emergency Room setting and detainee's specified medical condition. In cases where an inpatient admission may be medically necessary following an initial Emergency Room visit; a new TAR must be submitted by the detainee's custodial facility.

Medical Appointment (Not a consult) – Health services consistent with the Provider's specialty and detainee's specified medical condition.

Medical Lab/Test – Labs and/or Tests consistent with the detainee's specified medical condition.

Inpatient Hospitalizations – Health services consistent with an inpatient hospitalization and the detainee's specified medical condition.

Dental Services – Health services consistent with a dental Provider's specialty and detainee's specified medical condition.

Non-Formulary Medications – Any medications not included on DIHS' designated formulary

Conal Doyle, Cal. Bar #: 227554
WILLOUGHBY DOYLE LLP
1814 Franklin Street, Suite 800
Oakland, CA 94612
(510) 451-2777
fax: (510) 835-1050
conal@willoughbydoyle.com

Adele Kimmel, Cal. Bar #: 126843
PUBLIC JUSTICE, P.C.
1825 K Street, NW, Suite 200
Washington, DC 20006
(202) 797-8600
fax: (202) 232-7203
akimmel@publicjustice.net

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA**

FRANCISCO CASTANEDA, Plaintiff, vs. THE UNITED STATES OF AMERICA, et al. Defendants.	) Case No.:) CV07-07241 DDP (JCx))) **DECLARATION OF CONAL DOYLE IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS**)) (Filed Feb. 11, 2008)

I, CONAL DOYLE, declare as follows:

1. I am lead counsel for the Plaintiff in this matter.

2. The exhibits (1-33) attached to this Declaration are true and correct copies of the Plaintiff's medical records produced by the United States in response to the Plaintiff's FOIA request for his medical records. The same records were produced by the United States Attorney's Office in Response to the Plaintiff's Request for Production of Documents and/or as part of the United States Rule 26 Disclosures.

3. The exception to the Exhibits listed in paragraph #2 is Exhibit #4 to this Declaration, which is the June 7, 2006 Report of John Wilkinson, M.D. The last page of that Exhibit, which states: "I spoke with the physicians at the correctional facility. I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost effective. They understand the need for urgent diagnosis and treatment" was not produced by the United States in their Response to Plaintiff's FOIA request. Plaintiff first obtained this page of the report from Dr. Wilkinson. This page was then produced by the United States as part of their Rule 26 Disclosures.

4. The records reflect medical treatment received by the Plaintiff while he was detained by the United States from March 27, 2006 until February 5, 2007.

5. Exhibit 34 is a true and correct copy of the DIHS Detainee Covered Services Package, dated August 25, 2005, obtained from the DIHS website.

6. Exhibit 35 is a true and correct copy of the U.S. Department of Justice, Federal Bureau of Prisons, Program Statement on Patient Care, dated January 15, 2005.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and is based on personal knowledge and that I am competent to testify as to the contents of this declaration and that this declaration was executed on February 11, 2008 in San Francisco, CA.

/s/ Conal Doyle
CONAL DOYLE

[EXHIBIT 1]

(Filed Feb. 11, 2008)

PREVIOUS EDITION IS USABLE
AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD	CHRONOLOGICAL RECORD OF MEDICAL CARE
DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION *(Sign each entry)*
3-28-06 1045	S 34 yr hisp ♂ c/o genital warts x 2 years. at Donovan State prison they were
NKDA 0 meds ½ ph/d mother	going to take me to surgery. My fore-skin is too tight. 0 depuria 0 pyuria. O US deferred. Multiple areas of hypopigmentation noted to pt.'s skin in the G-U area. Obvious large mush-roomed hypopigmented lesion to distal

foreskin of penis. 0 pus or bleeding noted.
Obvious phimosis of this uncircumcised ♂. Pt. does attempt cleaning area daily s̄ great success. Urinating well.
Testicles WNL. Exam otherwise unremarkable.
A 1 Larger genital lesion 2 Severe phimosis
P – Urology consult. asap c̄ request for biopsy. Also may need release of phimosis. Pt – educated understands.
/s/ [Illegible] Anthony A. Walker,
PA-C
LT, USPHS
Physician Assistant

HOSPITAL OR
MEDICAL FACILITY STATUS

DEPART./SERVICE RECORDS MAINTAINED AT

SPONSOR'S NAME SSN/ID NO.

WARD NO. REGISTER NO. RELATIONSHIP TO SPONSOR

PATIENT'S IDENTIFICATION:
(For typed or written entries, give: Name – last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)

CASTANEDA, FRANCISCO
¶094 149 233
DOB: 2-10-72

CHRONOLOGICAL RECORD
OF MEDICAL CARE
Medical Re

STANDARD FORM 600 (REV. 6-97)
Prescribed by GSAMCMR
FIRMR (41 CFR) 201-9.202-1

[EXHIBIT 2]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

03/28/06 – Scanned Document
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Document: 793-MEDICAL CONSENT FORM 03/28/06 Author: Juliet E. Brandel
To: FRANCISCO CASTANEDA

*** This document must be manually printed for inclusion in the overall document

04/11/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Medical

Text: S: Pt returned for scheduled f/u to discuss TAR request for urology consult

O: PE deferred

A: 1. Severe phimosis 2. Penial lesion need r/o CA 3. FMHx mother deceased PANCREATIC CA at age 39

P: Will resubmit denied TAR to provide more information

	Encounter Type	Medical	
	Scheduled Date	04/11/2006	0730
	Encounter Date	04/11/2006	
Labs	Order ID	200603286ER0037	
	Lab Performed Date/Time	03/28/2006	02:04 PM
Next Encounter:	Chart Review Require?	No	
	Chart Review Type	Standard	
Workflow	Completed When	04/11/2006	08:42 am
Assigned To	Anthony A. Walker		

[EXHIBIT 3]

TARweb Authorization Form

Division of Immigration Health Services **Treatment, Authorization & Consultation Form**

(Filed Feb. 11, 2008)

SEND CLAIMS TO:
Immigration Health Services
1220 L Street, NW
PMB 468
Washington, DC 20005-4018
Phone: 1.800.479.0523
Fax: 1.866.475.9349

A separate treatment authorization request will be required for services beyond and outside the scope of the original authorization. Services rendered may not be paid without an approved authorization. All payment for services is subject to detainees' eligibility and custody. All claims are subject to retrospective review. For further guidance and information, please refer to the DIHS website: www.inshealth.org or contact the Immigration Health Services' Managed Care Branch at 1.888.718.8947, M-F 8AM-8PM EST.

Please ensure all claims include the Patient Identification Information and the Authorization number.

IMPRINT OF DETAINEE ID PLATE, COMPUTER LABEL OR COMPLETE BELOW:	
Name: FRANCISCO CASTANEDA	Alias:
DOB: 02/10/1972	A#: 094149233
Nationality: EL SALVADOR	Facility: DIHS San Diego, CA

AUTHORIZED ACTION:

Status Approved Auth #0200605316672 000

Authorizer: Claudia Mazur, RN, CCM

Service Type: Non-Emergency

Referral Type: 11

To: (*Name and Phone to whom referral is being made*)

Dialogue of Request:

Approve lesion excision for biopsy, surgical correction of glans penis for severe hypospadias and circumcision, and pertinent surgical f/u.

Updated by Claudia Mazur, RN, CCM on Wednesday, May 31, 2006

34yo hisp male with strong family hx various cancers. Pt with macerated lesion to glans penis, RPR negative, HIV negative, lesion is becoming worse. Urology unable to see this pt, however lesion removal and biopsy is strongly recommended by a surgeon for lab study. Pt has been treated for possible infections to

no avail. Lesion has foul odor. Also has severe hypospadias with 8/10 pain with urination and erection. Grossly uncircumsized. Strongly recommend lesion excision for biopsy, surgical correction of glans penis for severe hypospadias and circumcision, and pertinent surgical f/u. Due to family history and pt discomfort, sooner the better. Thank you

Provisional Diagnosis: 58.45 REPAIR OF HYPOSPADIAS OR EPISPADIAS

Consultation Report:

* * *

[EXHIBIT 4]

(Filed Feb. 11, 2008)

John R. Wilkinson, M.D.
Hematology Oncology Diplomat
5555 Reservoir Drive #306
San Diego, CA 92120

Office (619) 287-9910 **Fax (619) 286-4355**

Date: 06/07/2006

Subject: Francisco Castanedca [sic]
CA

Birthdate: 02/10/1972
Home:

From: John R. Wilkinson, M.D.

Prepared by: John R. Wilkinson, M.D.

To: Printer

I agree with the physicians at the metropolitan correctional Center that this may represent either a penile cancer or a progressive viral based lesion. I strongly agree that it requires urgent urologic assessment of biopsy and definitive treatment. In this extremely delicate area and there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated. I would recommend that he return to see us only if he is found to have a neoplasm as the cause of his penile lesion.

I've not found any correlation between penile cancers and vitiligo in a Medline search.

Enclosures:

Vitals	
Date:	06/07/2006 08:59
Weight:	261 lbs
Pulse:	84 BPM regular
BP:	140/92 arm – sit
Temp:	96.7 F° tympanic
Resp:	24 unlabored
Ox:	98Percent room air
Pain:	3 of 10

Medical History

Chronic Problems		History
Other {Atrophy} {Fibrosis} {Hypertrophy} {Ulcer (Chronic)} of Corpus Cavernosum or Penis	607.89	

Temporary Problems

Meds/Allergies

Chronic Medications

Medication	Sig
Pen-V V potassium 500 mg	1 tab(s) PO 4 times a day
Motrin 800 mg	1 tab(s) PO 3 times a day

Allergies/Adverse

Drug	Reaction
NKA	No Known Allergies

[6-7-06]
LT. Anthony Walker
Physician Assistant
ICE Medical [Illegible]
[Received [Illegible]]
6/7/2006

Med Refill History

Medication Refill History

Date	Medication	SIG	Disp ##	Refill	Authorized	Pharmacy

Med History

Medication History

Start Date	Stop Date	Medication	Sig	Reason	Stopped By

General History

Social History

Alcohol Use

Beer Heavy

Tobacco Use

Cigarettes 1 ppd x 15 years – told to stop

Recreational Drug Use

Metamphetamine [sic]

Family History

Mother

Father

Brother

Brother

Brother

Sister

Daughter

Diagnostic Procedure History

Surgical History

Immunization History

Notes

Note Type: Level 4
Note Date: 06/07/06

Patient Name:
Castanedca, Francisco
02/10/1972

Type: Established Patient
Opened: 06/07/2006 08:56
By: John R. Wilkinson, M.D.
Close: 06/07/2006 09:20
By: John R. Wilkinson, M.D.

Provider:
John R. Wilkinson, M.D.
Date of Service: 06/07/06
Type of Service:
Office visit
Note Type: Level 4
History Source: Patient

CHIEF COMPLAINT:
Three-year history of fungating lesion on a foreskin on left side becoming increasingly large.

HISTORY:
Patient with a three-year history of vitiligo and hyperpigmentation of his scrotum and penis, who has developed a fungating lesion on the left side of his foreskin. Lesion at times has a foul-smelling discharge, which responds briefly to oral antibiotics, and then develops further superficial infection. He has had complaints of genital warts.

An outpatient referral is pending for urologic care and a biopsy. It is being arranged by the physicians at the Metropolitan corrections Center.

No evidence of regional lymphadenopathy, no sign of distant metastasis.

Had dental extraction of fractured tooth yesterday.

ROS:

CONSTITUTIONAL: Patient denies chills, difficulty falling asleep, easy fatigability, fever and malaise.

EYES: Patient denies cataracts, change in acuity, glaucoma and recent eye exam.

ENT: Patient denies change in hearing, hearing loss, nasal congestion, nasal discharge, tinnitus and vertigo.

CARDIOVASCULAR: Patient denies change in exercise capacity, edema, exertional chest pressure, exertional chest tightness, lightheadedness, orthostatic hypotension, palpitations and regular exercise.

RESPIRATORY: Patient reports cigarette smoking; denies cough, history of TB exposure and shortness of breath.

GASTROINTESTINAL: Patient denies abdominal pain, anorexia, change in bowel habits, heartburn, hematochezia, vomiting and nausea.

GENITOURINARY: Patient reports dysuria; denies erectile dysfunction, urinary dribbling, urinary frequency, urinary incontinence and weak urinary stream.

MUSCULOSKELETAL: Patient denies joint pain, joint stiffness, joint swelling and low backpain.

SKIN: Patient reports new or unusual skin lesions.

NEUROLOGY: Patient denies headache, migraine headaches, new or unusual headaches, sinus headaches, tension headaches, unusual numbness or tingling and weakness.

ENDOCRINOLOGY: Patient denies cold intolerance, heat intolerance, unexplained weight gain and unexplained weight loss.

VITALS:

06-07-2006 08:59	**Weight:** 261 lbs	**Pulse:** 84 BPM	**BP: 140/92** [arm-sit]	**Temp:** 96.7 F° **[tymp]**
	Resp: 24/min [unlab]	**Oximetry:** 98Percent [RA]	**Pain:** 3 of 10	

EXAM:

CONSTITUTIONAL:
General – well nourished-well-developed and in no distress.

EYES:
Pupils – equal-round-reactive to light.
Conjunctiva –pink; pink.
Fundoscopic –examination reveals sharp discs and normal vessels.

EARS-NOSE-MOUTH-THROAT:
Ears – external ears normal bilaterally.
Otoscopic – ear canals clear – tympanic membranes pearly.
Hearing – grossly normal.
Nasal Mucosa – pink normal appearing mucosa. Clear secretions.
Lips – moist.
Dentition –fair and poor
Gums – erythema.
Oropharynx – well hydrated. No lesions.

NECK:
Neck – supple. Trachea midline.
Thyroid – symmetric and without nodules tenderness or enlargement.

RESPIRATORY:
Respiratory Effort – respirations unlabored.
Auscultation –clear to auscultation – without rales ronchi or wheezes.
Palpation – no chest wall tenderness. Symmetric tactile fremitus.
Percussion – no abnormal dullness noted.

CARDIOVASCULAR:
PMI –normal size palpable in the left 5th ICS at the left midclavicular line.
Auscultation – reveals a regular rhythm with no murmurs – gallops – or rubs.
Carotids – 2 bilaterally and without bruits.
Abdominal aorta – not palpably enlarged and not tender.
Femoral pulses – 2 bilaterally and without bruits.
Pedal pulses – 2 dorsalis pedis and posterior tibial pulses.
Edema – no pedal – ankle – or leg edema.

BREASTS:
Breast inspection – symmetric size and shape. No skin or nipple abnormality.
Palpation – no mass or tenderness.

ABDOMEN:
Abdomen – obese-soft and nontender.
Liver-spleen – no hepatosplenomegaly.
Hernias – none noted.

GENITOURINARY:
Penis –lesion proximally of 1 x 1 cm on the lateral portion of the foreskin fungating in nature, no discharge at this time, no erythema, no bleeding. Patient has the vitiligo and hyperpigmentation of he

is [sic] penis and scrotum which he states has been increasing for the past three years.
Testes – present bilaterally and normal.

NEUROLOGIC:
Cranial Nerves – II-XII are grossly intact.
DTR – 2 and symmetric.
Sensation –Intact to light touch and pinprick.

LYMPHATICS:
no lymphadenopathy in anterior or posterior cervical chains, supraclavicular, axillary or inguinal regions.
CBC performed today, June 7, 2006.
White count 8200, hemoglobin 15.1, hematocrit 45.6Percent, MCV 84.
RDW 12.6Percent, platelet count two and 20,000.
Granulocytes 50.8Percent, lymphocytes 44Percent, mono/mid 5Percent

PLAN:
I agree with the physicians at the metropolitan correctional Center that this may represent either a penile cancer or a progressive viral based lesion. I strongly agree that it requires urgent urologic assessment of biopsy and definitive treatment. In this extremely delicate area and there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated. I would recommend that he return to see us only if he is found to have a neoplasm as the cause of his penile lesion.

I've not found any correlation between penile cancers and vitiligo in a Medline search.

Signed off by: John R. Wilkinson, M.D. On: 06/07/06 at 09:20

John R. Wilkinson, M.D.
Note Saved: 06/07/2006 09:20 A by John R. Wilkinson, M.D.

(Filed Feb. 11, 2008)

ChartConnect: 508,457,0777
Fri Jun 23 13:22:15 2006 Page 6/6

Patient Name: Castanedos [sic], Francisco (02/10/1972)
Provider: John R. Wilkinson, M.D.
Date of Service: 06/07/06
Type of Service: Office Visit
Note Type: Level 4
History Source: Patient

Type: Established Patient
Opened: 06/07/2006 09:28
By: John R. Wilkinson, M.D.
Close: 06/07/2006 09:30
By: John R. Wilkinson, M.D.

PLAN:

Plan Comments:

I spoke with the physicians at the correctional facility. I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost effective. They understand the need for urgent diagnosis and treatment.

Signed off by: John R. Wilkinson, M.D.
On: 06/07/06 at 09:30

John R. Wilkinson, M.D.
Note Saved: 06/07/2006 09:30 A
by John R. Wilkinson, M.D.

[EXHIBIT 5]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

06/07/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Esther Hui, MD
Patient: FRANCISCO CASTANEDA
Description: Medical Admin
Text: Dr. Wilkinson called in regards to this patient who he saw in clinic today. This patient has a penile lesion that needs to be biopsied. He is not able to biopsy this lesion but offered to admit him to the hospital in order to assist in the coordination or care. Since this is an elective outpatient procedure, we decided that we would not admit him at this time. Spoke with the MLP who has been taking care of this patient. This patient needs to be seen by a urologist first. If the biopsy proves to be cancerous, then we will re-refer this patient back to Dr. Wilkinson, the medical oncologist. MLP will e-mail Feldmans about urologist and their issues regarding payment.

	Encounter Type	Medical	
	Scheduled Date	06/07/2006	
	Encounter Date	06/07/2006	
Labs	Order ID	20060607PEU0002	
	Lab Performed Date/Time	06/07/2006	09:05 AM
Next Encounter:	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	06/07/2006	09:25 am
Assigned To	Esther Hui, MD San Diego, CA		

06/07/06 – Scanned Document
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Document: 06/07/06
DR. WILKINSON'S
CONSULTATION REPORT
Author: Alicia Padillo
To: FRANCISCO CASTANEDA

** This document must be manually printed for inclusion in the overall document

* * *

[EXHIBIT 6]

(Filed 02/11/2008)

Grievance No.: 06-103 **RECEIVED** JUN 14 2006
Form 14-5A –
For Official Use Only

CCA INMATE/RESIDENT GRIEVANCE FORM

Name (Print): CASTANEDA FRANCISCO A
Last Name First Middle Initital

Number: 94149233

Housing Assignment: D/N 218

INFORMAL RESOLUTION ATTEMPTED?
Yes X **No** _____

NAME OF STAFF CONTACTED DR. WALKER

STATE GRIEVANCE (Include documentation, witnesses, date of incident and any other information pertaining to the grievance subject. Attach additional pages if necessary).

THIS GRIEVANCE IS DIRECTED AT DR. HUI IN CONCERNS WITH HER DECISION DENYING THE PRESCRIBED SURGERY PERTAINING TO MY CURRENT MEDICAL CONDITION.
(PLEASE SEE ATTACHMENT)

Requested Action

I WANT PROPER MEDICAL TREATMENT AS SOON AS POSSIBLE.

Inmate/Resident's Signature: X Castaneda

Date Submitted: 6/12/06

GRIEVANCE OFFICER'S REPORT

Not resolved. Pt. wants further evaluation, assessment and treatment. Pt. will be reassessed and further outside resources readdressed.

GRIEVANCE OFFICER'S DECISION

Pt. explained that he was never denied any treatment but pre-authorization must be gained prior to any treatment.

Grievance Officer's Signature: [Illegible]
Lt. Anthony Walker
Physician Assistant
ICE Medical Facility
- San Diego

Date: 7-12-06

Inmate/Resident's Signature (upon request):
Refused to sign **Date:** 7-12-06

RECEIVED AUG 17 2006

APPEAL: Yes X No ___

STATE REASON(S) FOR APPEAL: 1. I NEED MEDICAL ATTENTION BECAUSE I'M STILL IN PAIN. 2. I WANT TO KNOW WHY I RECEIVED MY GRIEVANCE BACK UNTIL AUG. 15, 2006 ALMOST 2 MONTHS AFTER I SUBMITTED MY GRIEVANCE.

WARDEN/ADMINISTRATOR'S RESPONSE:

_____ _____

_____

_____

Warden/Administrator's Signature: _____

Date: _____

Inmate/Resident's Signature (upon request):

_____ **Date:** _____

Revised 02/01/02

(ATTACHMENT)

I WAS DIAGNOSED BY DR. WALKER APPROX. IN THE ENDING OF APRIL 2006. DR. WALKER DEEMED IT NECESSARY TO REFER MY CASE TO A SPECIALIST. ON JUNE 7, 2006, I WAS TRANSPORTED TO THE ALVARADO MEDICAL CENTER AND I WAS INTERVIEWED AND DIAGNOSED BY THE ATTENDING PHYSICIAN WHOM GAVE HIS PROFESSIONAL OPINION AND RECOMMENDED THAT I SHOULD BE ADMITTED AND THAT THE SURGERY SHOULD BE PERFORMED.

AT THIS TIME, DR. HUI DECIDED AGAINST THE PROPOSED SURGERY AND DENIED THE ADMITTANCE.

I AM IN A CONSIDERABLE AMOUNT OF PAIN AND I AM IN DESPERATE NEED OF MEDICAL ATTENTION. I AM RESPECTFULLY REQUESTING PROPER MEDICAL ATTENTION AND PROFESSIONAL TREATMENT. I FEEL THAT I AM ENTITLED TO A HEALTHY LIFE.

IF THIS INSTITUTION ELECTS TO CONTINUE TO DENY ME MEDICAL TREATMENT, I WILL BE FORCED TO SEEK LEGAL ASSISTANCE TO RECTIFY THIS MATTER.

SINCERELY

x /s/ F. Castaneda
F. CASTANEDA
A 94149233

[EXHIBIT 7]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

06/07/06 – Scanned Lab Results
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San
FRANCISCO Diego, CA 20060327

Document: Lab Results 06/07/06 Author: Alicia Padillo
To: FRANCISCO CASTANEDA

*** This document must be manually printed for inclusion in the overall document

06/23/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San
FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: S: Pt here today for f/u after seeing on
Text: S: Pt here today for f/u after seeing oncologist (see scanned report). Pt states it is getting worse, more swelling to the area, foul odod [sic], drainage, more difficult to urinate, bleeding from the foreskin.

O: Obvious slightly purulent drainage from foreskin of penis next to lesion on penis.

called Dr. Masters, Urologist and Dr. Wilkinson, Oncologist and left messages

A: Penile lesion etiol unk.

P: Dr. Wilkinson, Oncologist 619-287-9910 has seen this patient and determined further workup

Dr. Masters, Urologist 619-226-8200 is willing to see this patient but wants to talk with above oncologist

Waiting for return calls

	Encounter Type	Medical	
	Scheduled Date	06/23/2006	
	Encounter Date	06/23/2006	
Labs	Order ID	20060623OIH0062	
	Lab Performed Date/Time	06/23/2006	12:01 PM
Next Encounter:	Chart Review Required?	No	
	Chart Review Type	Standard	
	Next Encounter Date	07/06/2006	0830
	Next Encounter Type	Medical	
Workflow	Completed When	06/23/2006	12:28 pm

* * *

[EXHIBIT 8]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

Taper Dose Directions 6 no data no data
Taper Dose Days 7 no data no data
Taper Dose Directions 7 no data no data
Approved By Edwin V. Deguzman (619) 710-8339
San Diego, CA 92154
Ordered By Anthony A. Walker

06/23/06 – Scanned Document
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San
FRANCISCO Diego, CA 20060327

Document: MAR 06/23/06 Author: Juliet E. Brandel
To: FRANCISCO CASTANEDA

*** This document must be manually printed for inclusion in the overall document

06/30/06 – Period of Custody Note
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San
FRANCISCO Diego, CA 20060327

Consultant: Anthony A. Walker
Contact:
Description: Late entry – progress note
Text: I have been following this detainee and he DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in the laboratory. There are some concerns that was explained to the patient by Dr. Wilkinson the oncologist but we are

awaiting good communication between he and Dr. Masters, Urologist concerning the best direction, if any at all, with this patient. This pt was seen by me last week and he was told that he does not have cancer at this time and we aren't sure what this lesion will present, if and when, a biopsy is completed. This is something that can be managed also upon his release as well if that this is the concern here. It is a 3 year history with the past few months of the lesion looking and acting a bit more angry. Also there is a severe deformed uncircumsized foreskin growth that could use attention but this lesion is an impediment at this time according to Dr. Masters. Basically, this pt needs to be patient and wait. His name is Francisco Canteneda in D/N unit. ICE staff member came to me after LT Ortiz and I talked and he was told that this detainee needs to exercise patience. I expressed that at this time we are attempting to investigate what this may be. He stated to me that he will tell the detainee to relax and be patient.

[EXHIBIT 9]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

Approved By Edwin V. Deguzman (619) 710-8339
San Diego, CA 92154
Ordered By Anthony A. Walker

07/12/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San
FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Medical
Text: S: attempted to call Dr. Masters, Urologist this am, told him back at noon today because he is in surgery at this time. called Dr. Wilkinson's office and left a message for him to call me as well. Completed a grievance which detainee refused to sign. He has deep concerns about his health and the lack of treatment. I explained to him that I am attempting to contact the outside sources that may be able to help him, pt states understanding.

O: lesion on penis is draining clear, foul malodorous smell, cultured before were negative for growth. negative RPR, negative HIV. foreskin is bleeding at this time and pt states his colon feels swollen, previous rectal exam showed slightly swollen prostate, deferred today

A: unk etiology of penial lesion

P: continue to contact outside sources for urology.

	Encounter Type	Medical	
	Scheduled Date	07/12/2006	0830
	Encounter Date	07/12/2006	
Labs	Order ID	20060623OIH0063	
	Lab Performed Date/Time	06/23/2006	12:24 PM
Next Encounter:	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	07/12/2006	10:37 am

Assigned To Anthony A. Walker

[EXHIBIT 10]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

Labs	Order ID	200607124D50040	
	Lab Performed Date/Time	07/12/2006	12:37 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	

07/12/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Late entry
Text: Pt was counseled today concerning greivance c/o Dr. Hui not allowing him to be seen for his recent and ongoing complaint of a penile lesion. Pt was seen 6-7-06 by oncologist, Dr. Wilkinson, who recommended that he have a urological biopsy performed to determine type and depth of lesion, and also to eval/assess the degree of phimosis and remedy. Pt was not denied by Dr. Hui any treatment, albeit, there was no active Treatment Authorization Request (TAR) placed for

approval by DIHS headquarters in Washington DC, nor was there an emergent need. Due to the inability to locate a urologist to see this patient in this area, the patient has noticed a change in the lesion, and has contacted family members who are under the impression that he has cancer and bleeding from the penis without any treatment or evaluation by this staff. This provider and this clinic has been in contact by telephone on at least 4-6 occasions with Dr. Masters, Urologist, but finally made actual contact today. Dr. Masters strongly recommends this patient be seen sooner than later, but did not stress immediate urgency. This provider instructed the patient that Dr. Hui did not say he could not have further evaluation or treatment if necessary, it was however necessary to make room for an appropriate response and intervention with authorization that could better suit the need of patient and the agency involved. He stated that he understood but really wanted treatment. He has never been circumsized, noticed this lesion about 3 years ago but only since around February 2006 that it became worse, and did not seek treatment or evaluation until his arrival to this facility.

	Encounter Type	Other	
	Scheduled Date	07/12/2006	
	Encounter Date	07/12/2006	
Labs	Order ID	200607124D50052	
	Lab Performed Date/Time	07/12/2006	03:19 PM
Next Encounter:	Chart Review Required?	No	
	Chart Review Type	Standard	

Workflow	Completed When	07/12/2006	03:32 pm
Assigned To	Anthony A. Walker		

[EXHIBIT 11]

TARweb Authorization Form

(Filed Feb. 11, 2008)

Division of Immigration Health Services **Treatment, Authorization & Consultation Form**

SEND CLAIMS TO:
Immigration Health Services
1220 L Street, NW
PMB 468
Washington, DC 20005-4018
Phone: 1.800.479.0523
Fax: 1.866.475.9349

A separate treatment authorization request will be required for services beyond and outside the scope of the original authorization. Services rendered may not be paid without an approved authorization. All payment for services is subject to detainees' eligibility and custody. All claims are subject to retrospective review. For further guidance and information, please refer to the DIHS website: www.inshealth.org or contact the Immigration Health Services' Managed Care Branch at 1.888.718.8947, M-F 8AM-8PM EST.

Please ensure all claims include the Patient Identification Information and the Authorization number.

IMPRINT OF DETAINEE ID PLATE, COMPUTER LABEL OR COMPLETE BELOW:	
Name: FRANCISCO CASTANEDA	Alias:
DOB: 02/10/1972	A#: 094149233
Nationality: EL SALVADOR	Facility: DIHS San Diego, CA

AUTHORIZED ACTION:

Status Approved Auth # 200607120949 00

Authorizer: Claudia Mazur, RN, CCM

Service Type: Non-Emergency

Referral Type: 23

To: (*Name and Phone to whom referral is being made*)

Dialogue of Request:

Approve ER evaluation and treatment 7-13-06.
Updated by Claudia Mazur, RN, CCM on Thursday, July 13, 2006

34yo hisp male with continued growing lesion to penis with severe phimosis, bleeding, and clear drainage from lesion area with foul odor. Spoke with Dr. Wilkinson, Oncologist 619-287-9910 and Dr. Masters, Urologist 619-226 8200 who both strongly recommend admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant findings. Pt. has been at this facility since 3-27-06 and states that

has had this lesion for about 3 years but noticed it worsened around January or February 2006. There is now bleeding, drainage, malodorous smell and the lesion now appears to be "exploding" for lack of better words definitely macerated. Request for urology and oncology inpatient eval and treatment with outpatient follow-up.

Provisional Diagnosis: 605 REDUNDANT PREPUCE AND PHIMOSIS

* * *

Workflow	Completed When	07/12/2006	03:32 pm
Assigned To	Anthony A. Walker		

[EXHIBIT 12]

Scripps Mercy Chula Vista

[LOGO]
Scripps

EMERGENCY RECORD

(Filed Feb. 11, 2008)

NAME:	**CASTANEDA, FRANCISCO**	**MED REC #:**	700359109
Admission Date:	07/13/2006	Room:	CC3F0315/01
Dict Phys:	JUAN TOVAR	Account #:	100302627

CHIEF COMPLAINT:
Lesion on penis.

HISTORY OF PRESENT ILLNESS:
The patient is a 34-year-old male brought in by prison officers for evaluation and treatment of a penile mass. The patient apparently states that he has had this lesion over the last 3 years, which has grown and now he has what he describes as phimosis, bleeding and clear drainage from the lesion with foul odor at times. Apparently, from prison documents, he has had antibiotics in the past. he has been seen by Dr. Wilkinson, oncologist, and Dr. Masters, urologist, who both are still recommending admission. The patient will more likely need a biopsy and evaluation under general anesthesia, to include circumcision if nonmalignant.

The patient has had this lesion for the last 3 years, but noticed that it got worse around 4-5 months ago. He states that it now bleeding with drainage, at times malodor, and now appears to be increasing in size. The patient has had no history of fevers, has a possible history of penile genital warts. The patient also describes vitiligo and hyperpigmentation around his penis. The patient denies fever. He denies scrotal pain. He denies back pain. He denies chest pain, palpitations, shortness of breath.

SOCIAL HISTORY:
The patient is currently in prison. He was brought in by prison officials. The patient apparently smoked 1

pack per day x 15 years. He has a history of recreational methamphetamine use.

FAMILY HISTORY:
Noncontributory.

REVIEW OF SYSTEMS:
CONSTITUTIONAL: No complaints of fever, unexplained weight loss, or other significant systemic complaints. EYES: No complaints of visual disturbances or eye pain. ENT: No complaints of ear, nose, or throat systems. CARDIOVASCULAR: No complaints of chest pain or dysrhythmia. GASTROINTESTINAL: No complaints of abdominal pain, nausea, vomiting, or diarrhea. GENITOURINARY: As above. MUSCULOSKELETAL: No complaints of significant bone, joint, or extremity pain. SKIN: No complaints of rash. BREASTS: No breast pain or discharge. NEUROLOGIC: No neurologic complaints or headaches. ENDOCRINE: No acute endocrinologic symptoms. HEMATOLOGIC: No history of bleeding disorders or anemia. LYMPHATIC: No history of lymphatic disorders. ALLERGIC: No known allergies noted. IMMUNOLOGIC: No history of immunosuppression, compromise, or disorders.

PHYSICAL EXAMINATION:
VITAL SIGNS: Temperature 99.1, pulse 84, respiratory rate 20, blood pressure 146/89. GENERAL IMPRESSION: He is well-developed, well-nourished, in no acute distress, lying in bed quietly. HEENT: Normocephalic, atraumatic. EOMs intact. Pupils intact, 3 mm. Oropharynx is clear, no lesions. NECK:

Supple, full range of motion, nontender. CHEST: Nontender. LUNGS: Clear to auscultation bilaterally. HEART: Regular rate, no murmurs. ABDOMEN: Soft, nontender, no masses, guarding, rigidity. GU: The patient has a uncircumcised penis with a phimosis and on one part of the foreskin/prepuce, the patient has a 1.5 x 2-cm fungating lesion with slight clearish discharge, but no signs of induration, no signs of abscess. There is vitiligo around his penile shaft, skin, as well as his scrotum. He has no lymphadenopathy that I can appreciate.

COURSE:
The patient had an IV placed, a set of labs were drawn including hepatitis panel with GC and Chlamydia, RPR, and wound culture. The patient had an IV placed, normal saline started at 125 mL per hour. Chest x-ray, PA and lateral, was ordered. I discussed the case with Dr. Uwedjojevwe, who agreed to admit this patient. She asked me to call Dr. Al Kourainy whom I discussed the case with as well, and Dr. Daniel Hunting. Both specialists agreed to consult on this case. I have written holding orders on the patient. The patient will be admitted to the hospital.

IMPRESSION AT THIS TIME:
Penile mass, rule out cancer, versus infectious etiology.

CONDITION:
Fair.

DISPOSITION:
Admission to the hospital, inpatient EA.

SIGNED ELECTRONICALLY
JUAN TOVAR,

JT
D: 2006-07-13 15:29:00
T: 2006-07-13 16:37:00
20060713156472550O

[EXHIBIT 13]

Scripps Mercy Chula Vista

[LOGO]
Scripps

[ER 7-13-06]

PREOPERATIVE HISTORY AND PHYSICAL

(Filed Feb. 11, 2008)

NAME:	**CASTANEDA, FRANCISCO**	**MED REC #:**	700359109
Admission Date:	07/13/2006	Room:	CC3F 0315/01
Dict Phys:	DANIEL HUNTING,	Account #:	100302627

HISTORY OF PRESENT ILLNESS:
Francisco Castaneda is a 34-year-old gentleman who has had a lesion on his penis for the last two years. He saw a urologist about a month ago at ElDorado, who advised a circumcision. He says it might be cancer, but there was a question that it is a wart. The patient has had also some questionable urethral discharge, however, on examination, he has had no

urethral discharge. He has no history of HIV or hepatitis

C. He is not drinking or doing drugs. He is a prison inmate. The patient has no other serious medical illnesses, no diabetes, tuberculosis, lung disease and is generally healthy.

PHYSICAL EXAMINATION:

ABDOMEN: Obese, no masses, no inguinal nodes palpable. GENITOURINARY: Testicles normal. The penis shows vitiligo. There is mild phimosis with an area on the prepuce about 1 cm x 1 cm, at 3 o'clock, which is probably condyloma. The glans seem to be okay; the meatus is okay. There is no pus coming from his meatus. He has no other obvious lesions; nothing suspicious for carcinoma. I would say that this is condyloma and I would refer him back to his primary treating urologist, who can do the elective program, which has been advised. This is not an urgent problem and he should followup with his prior urologist at ElDorado and have elective circumcision or condylosis or ALARA cream.

I discussed this in detail with Dr. Rayber and also discussed this with the patient and also the prison staff.

Daniel Hunting
DANIEL HUNTING,

DH
D: 2006-07-13 17:07:00
T: 2006-07-13 17:29:00
20060714156475370O

cc: DANIEL HUNTING, MD

Scripps Mercy Chula Vista

[LOGO]
Scripps

EMERGENCY RECORD

(Filed Feb. 11, 2008)

NAME:	**CASTANEDA, FRANCISCO**	**MED REC #:**	700359109
Admission Date:	07/13/2006	Room:	CC3F 0315/01
Dict Phys:	KIRK RAEBER,	Account #:	100302627

ADDENDUM:

The patient was seen by Dr. Hunting in the emergency room. He does not feel he will need to be hospitalized. He feels that he had condyloma and will need to follow up with his urologist whom he has seen in the past.

I talked with Dr. Uwedjojevwe and told her. She agrees. The patient will be placed on Bactrim, Septra DS one b.i.d. An RPR was ordered and is pending. GC culture and hepatitis panel are also pending.

The patient will be discharged to follow up with his urologist. Recommendation to follow up with his urologist.

MEDICAL DECISION MAKING:

Dr. Hunting feels that this is condyloma and not a cancerous mass that patient has had for quite some time.

SIGNED ELECTRONICALLY
KIRK RAEBER,

KR
D: 2006-07-13 17:16:00
T: 2006-07-13 18:04:00
20060714156475800

[EXHIBIT 14]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

07/17/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: 34yo hisp male with continued growing le
Text: 34yo hisp male with continued growing lesion to penis with severe phimosis, bleeding, and clear drainage from lesion area with foul odor. Spoke with Dr. Wilkinson, Oncologist 619-287-9910 and Dr. Masters, Urologist 619-226-8200 who both strongly recommend admission, urology consultation, surgical intervention

via biopsy/exploration under anesthesia to include circumcision if non-malignant, return f/u with oncology depending upon findings, and potential treatment or surgery of any malignant findings. Pt has been at this facility since 3-27-06 and states that he has had this lesion for about 3 years but noticed it worsened around January or February 2006. There is now bleeding, drainage, malodorous smell and the lesion now appears to be "exploding" for lack of better words, definitely macerated. Request for urology and oncology inpatient eval and treatment with outpatient follow-up. This pt will require more invasive procedures to include in-patient evaluation, surgical biopsy with circumcision and potential oncological followup. Will admit via ER today. CALLED 619-691-7000 SCRIPPS CHULA VISTA ER AND SPOKE WITH CHARGE NURSE WHO STATED THAT THEY HAD A UROLOGIST CONFIRM VIA EXAM CONDYLOMA, NE NEED FOR BIOPSY BUT PT WILL NEED A RESECTION OF THE PENIS DUE TO SEVERE PHIMOSIS AND GROSS CONDYLOMA. MEDICAL RECORDS AT 619-691-7336 CAN FAX ER REPORT TO THIS FACILITY (FAX: 619-407-7677) AFTER THEY RECEIVE FOIA SIGNED BY PATIENT.

	Encounter Type	Other	
	Scheduled Date	07/17/2006	
	Encounter Date	07/17/2006	
Labs	Order ID	20060717QE30001	
	Lab Performed Date/Time	07/17/2006	02:48 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	

Workflow	Completed When	07/17/2006	02:57 pm
Assigned To	Anthony A. Walker		

[EXHIBIT 15]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

07/18/06 – Scanned Document
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Document: SCRIPPS ER DISCHARGE 06/07/06 Author: Alicia Padillo
To: FRANCISCO CASTANEDA

**This document must be manually printed for inclusion in the overall document

07/18/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Encounter
Text: discussed with pt that this provider is not happy with inability to resolve or further investigate this issue with him. After speaking with emergency room

staff concerning the lack of interest to perform biopsy or other testing, pt will be submitted for early release to further his opportunities for testing and potential treatment. Pt is not satisfied but will remain diligent in seeking further care.

Awaiting ER reports, FOIA is signed and will be faxed this pm.

	Encounter Type	Medical	
	Scheduled Date	07/18/2006	1730
	Encounter Date	07/18/2006	
Labs	Order ID	20060717QE30010	
	Lab Performed Date/Time	07/17/2006	03:46 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	07/18/2006	08:06 pm

Assigned To Anthony A. Walker

[EXHIBIT 16]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

07/26/06 – Encounter

Alien#: 094149233 Name: FRANCISCO CASTANEDA

Case ID: 20060327QOTI0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: David Lusche, PA
Patient: FRANCISCO CASTANEDA
Description: Grievance
Text: SUBJECTIVE:

34 y/o Salvadoran male patient seen to respond to Medical Grievance.

Patient complains that he is being denied a needed surgery to his foreskin, and that he was told by an outside medical physician that he should have surgery on his foreskin.

During our conversation, I explained that while a surgical procedure might be recommended long-term, that does not imply that the Federal Government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight. Our interaction was conversational and calm, not confrontational. Patient listened calmly and accepted my response verbally, but he refused to sign the Grievance form.

OBJECTIVE:

GENERAL: Appears NIAD. Ambulates easily and without apparent discomfort. Calm, polite.

PENIS: Uncircumcised male patient. Hypertrophy of the foreskin, such that the foreskin cannot be fully retracted. Glans penis appears pink. No exudate noted.

ASSESSMENT:
Hypertrophy of foreskin; inability to retract foreskin

PLAN:
Given KOP: Chlotrimazole 1% cream to apply sparingly BID to foreskin area, prophylactically to avoid balanitis.

Grievance closed.
F/U PRN with PCP

	Encounter Type	Medical	
	Scheduled Date	07/26/2006	
	Encounter Date	07/26/2006	
Labs	Order ID	200607268GP0049	
	Lab Performed Date/Time	07/26/2006	10:40 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	07/26/2006	11:03 pm
Assigned To	David Lusche, PA		

[EXHIBIT 17]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

08/09/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San Diego, CA 20060327
FRANCISCO

Status: Complete
Author: David Lusche, PA
Patient: FRANCISCO CASTANEDA
Description: Sick Call
Text: SUBJECTIVE:

34 year old Mexican male patient seen for SICK CALL referral, and to reply to a MEDICAL GRIEVANCE.

Patient requests surgical removal of his inflamed foreskin. Patient complains of a discharge from his distal penis; it is not clear from his history whether he perceives the discharge to come from the urethra or from the foreskin area itself. Patient states he noticed his foreskin area becoming "uncomfortable" about 1 year ago.

OBJECTIVE:

GENERAL: Patient is calm, polite, and appears NIAD, ambulates without apparent distress.

PENIS: Foreskin inflamed and taught around glans penis d/t inflammation. Whitish grown approx. 8 mm diameter noted at inferior margin of foreskin. No discharge seen. Glans penis appears pink.

Urine Dipstick results:

Glucose	neg	
Bilirubin	neg	
Ketone		trace
Specific Gravity	1.015	
Blood	trace	
pH	7.0	
Protein		trace
Urobilinogen	0.2	
Nitrite	neg	
Leukocytes	moderate ++	

ASSESSMENT:
Inflammation of foreskin

PLAN:
EDUCATION: Explained that the urologist informed our staff that surgical removal of the foreskin, at the current time, would be considered elective surgery; that as such the Federal Government will not provide for such surgery. Patient expressed understanding, but calmly stated he does not agree with this decision. Patient refused to sign Grievance (perhaps because he believed that by doing so, he was

* * *

[EXHIBIT 18]

[SEAL] [SEAL]

UNITED STATES PUBLIC HEALTH SERVICE
IMMIGRATION HEALTH SERVICES
TREATMENT AUTHORIZATION REQUEST

Immigration Health Services –
1220 L Street, NW – PMB 468 –
Washington, DC 20005-4018
Phone: 1-888-718-8947 Fax 1-866-475-9349

(Filed Feb. 11, 2008)

Facility:	SAN DIEGO MEDICAL REFERRAL CENTER	Phone #	
Address:	P.O. Box 438150	Fax #	
	San Diego, CA 92143	State:	
City:	Tel: (619) 710-8339	Zip:	
	Fax: (619) 661-6042		

DETAINEE INFORMATION

Last Name: Castaneda First: Francisco

Alien ID: 094149233 Date of Birth 02/10/1972 Male ☑ Female ☐

Camp Arrival Date: _____ Country of Origin: El Salvador Custody Date ____

CUSTODY STATUS

Hearing Pending ☐ Court Date ____
FO Deportation ☐ TD Pending ☐ Appealing ☐
Exclusion ☐ Other _____

REASON FOR REFERRAL

Requester: Lt. Walker P.A. Request Date: 08-11-06

Diagnosis: Macerated Lesion on glans penis
CPT/CDT: _____

Course Of Treatment: Biopsy lesion on Penis, surgical correction of glans penis circumcision

PROVIDER OF MEDICAL CARE AND OTHER SERVICES

Name of Medical Facility: _____

Provider's Name: Dr. Robert Masters Specialty: Urology

Address: 3405 Canyon St. #504

City: San Diego State: CA Zip: 92110 Telephone: (619) 226-8200

Appointment Date: 8/22/06 Appointment Time: 1:00

AUTHORIZATION ACTION

Managed Care Coordinator: _____ Date: ____
(Signature)

Approved ☐ Denied ☐ Pending ☐ _____

ATTENTION – Submit claims together with a copy of the approved authorization request for payment of medical services to Immigration Health Services. A separate treatment authorization request will be required for services beyond and outside the scope of the original authorization. Services rendered may not be paid without an approved authorization. For further guidance and information, contact the Immigration Health Service's Managed Care Branch at 1-888-718-8947, M-F, 8 AM-6 PM EST. For claim status inquiry, call 1-800-479-0523.

[EXHIBIT 19]

(Filed Feb. 11, 2008)

ROBERT H. MASTERS, M.D. INC.
DIPLOMAT AMERICAN BOARD OF UROLOGY

3405 KENYON STREET, #504
SAN DIEGO, CA 92110
TELEPHONE: 619-226-8200
FAX: 619-228-8203

August 22, 2006

Lt. Walker, PA
San Diego Medical Referral Center
P. O. Box 438150
San Diego, CA 92143

RE: FRANCISCO CASTANEDA

Dear Mr. Walker:

I saw this 34-year-old Hispanic male at your request on 8/22/06.

His chief complaint is that of a painful penile wart. The lesion was first noted about two years ago and appears to be enlarging. It bleeds periodically. The patient has pain with erection and ejaculation and says that he has tenderness along the course of the distal urethra. Micturition symptoms include nocturia x 2 and burning at the site of the prepucial lesion. He also bleeds from the lesion and says that he has a discharge. He has not had urinary frequency or urgency and says that his stream is of normal caliber. Tests, including TB screening and RPR, were negative.

The patent is seeing Dr. John R. Wilkinson, who is an oncologic hematologist. His different diagnosis included either prepucial malignancy or progressive viral-based lesion. He recommended diagnostic biopsy.

PAST MEDICAL HISTORY: General health good. The patient has developed generalized vitiligo which seems to be increasing over the past 2-3 years.

ALLERGIES: None to medications.

SURGERY: None.

PRESENT MEDICATIONS: Ibuprofen.

FAMILY HISTORY: There is no history of renal disease or diabetes. The patient's maternal grandmother had cancer.

REVIEW OF SYSTEMS: EENT: Negative. CHEST: Negative. GI: Negative NEUROMUSCULAR: He developed a painful left ankle associated with exercise and physical activity.

PHYSICAL EXAMINATION: This is an overweight Hispanic male who is in no acute distress.

HEENT: Negative.

NECK: No thyromegaly or lymphadenopathy.

LUNGS: Clear to P&A.

HEART: Normal sinus rhythm with a Grade 1/6 systolic murmur.

ABDOMEN: No masses or tenderness.

EXTERNAL GENITALIA: Diffuse scrotal vitiligo is noted. The testes are anatomically normal. The penile shaft is uncircumcised. A 1.5 cm verrucous lesion is seen on the internal surface of the prepu on the left posterior surface. The lesion exhibits several superficial lacerations with associated small clots. The coronal sulcus is not involved with the lesion. The rest of the glans penis cannot be easily evaluated

because of the phimosis. The meatus appears to exit in the proper position but a small caruncle may be developing.

IMPRESSION:

1. Probable subprepucial condyloma accuminata (rule out malignant neoplasm).

2. Diffuse vitiligo.

3. Possible distal urethral condylomata.

COMMENTS: The appropriate treatment for this problem would be circumision [sic]. That would provide a biopsy and take care of the ongoing medical side effects of the lesion including infection and bleeding. The record makes mention of hypospadias, but I see no evidence of hypospadius on this examination. Because his history suggests the possibility of a urethral lesion, which is not uncommon with genital warts, cystoscopy should be accomplished after circumcision. It would be inadvisable to attempt urethroscopy prior to removing the active lesion due to the risk of inoculation of viral elements into the urethra at the time of the examination. Both circumcision and endoscopic evaluation of the distal urethra should be done as a come-and-go outpatient with general anesthesia.

If I may be of further assistance, please let me know. We will arrange for admission for circumcision at a local hospital. My principal hospital is Sharp Memorial.

Sincerely,

/s/ Robert H. Masers, MD
Robert H. Masters, M.D.

RHM/can
cc: John R. Wilkinson, M.D.

[EXHIBIT 20]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

08/22/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Cancelled
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Encounter
Text: DUPLICATE

	Encounter Type	Physical Exam	
	Scheduled Date	03/28/2007	
	Encounter Date	08/22/2006	
Labs	Order ID	20060811UOD0029	
	Lab Performed Date/Time	08/11/2006	04:23 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	

Assigned To Anthony A. Walker

08/22/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Spoke with Dr. Masters, Urologist, conce
Text: Spoke with Dr. Masters, Urologist, concerning his findings and diagnosis of the penial [sic] lesion, occasional bleeding and drainage, and urethral discomfort. According to Dr. Masters, this pt has a condyloma acuminata like lesion to the foreskin of his penis that may or may not be growing into the urethra. There is a small hernia like area to the outer meatus and a phimosis due to the uncircumcized glans penis. Dr. Masters stated that elective procedures this patient may need in the future are cystoscopy and circumcision, the latter being first so as not to spread the condyloma into the urethra if it is not there already. He is not sure where the bleeding and drainage is coming from but suspects with cystoscopy this may be electively noted.

	Encounter Type	Other	conversation
	Scheduled Date	08/22/2006	
	Encounter Date	08/22/2006	
Labs	Order ID	200608223G40023	
	Lab Performed Date/Time	08/22/2006	09:13 PM
Next Encounter	Chart Review Required?	No	

[EXHIBIT 21]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

Scrip3 KOP	Yes	
Scrip3 Travel Pack	No	
Scrip4 Prescription Type	Routine	Routine
Scrip4 Start Date	08/24/2006	
Scrip4 Labs Required for R	No	
Scrip4 KOP	Yes	
Scrip4 Travel Pack	No	
Scrip5 Prescription Type	Routine	Routine
Scrip5 Start Date	08/24/2006	
Scrip5 Labs Required for R	No	
Scrip5 KOP	Yes	
Scrip5 Travel Pack	No	

08/24/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Medical
Text: S: pt here to discuss urology consultation findings

O: pe deferred

A: counseling

P: pt told that the urologist diagnosed him with a condyloma acuminata that if the patient desired to pursue on an elective basis, could undergo circumcision with a cystoscopy

pt states he understands and wants to know if his surgery will be done while housed in this facility, and he was told according to policy, this would not occur

pt states he will pursue upon release

early release for medical reasons will be discussed with the medical team so that he may pursue treatment, surgery and f/u

pen vk rx for infectious drainage from penis

	Encounter Type	Medical	
	Scheduled Date	08/24/2006	1400
	Encounter Date	08/24/2006	
Labs	Order ID	200608223G40027	
	Lab Performed Date/Time	08/22/2006	10:38 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	08/24/2006	06:30 pm

[EXHIBIT 22]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

Assigned To Anthony A. Walker

08/26/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San
FRANCISCO Diego, CA 20060327

Status: Complete
Author: Erica Graham, RN
Patient: FRANCISCO CASTANEDA
Description: sick call

Text: S: detainee c/o stressful situation regarding medical status, unable to sleep @ night; states that ICE won't allow surgical operation for lesion on penis; states being transported to El Salvador soon and needs something done ASAP

O:VS(see below); good eye contact; no S.I.; appears concerned about medical status; hx of condyioma acuminata on penal area per urologist; insomnia; A/Ox4; NAD

A:Potential for altered coping skills

P: Diphenhydramine 25mg 1 tab @ hs #3 given. Detainee verbalized understanding of med usage. Encouraged stress reduction techniques. Will refer to psych.

	Encounter Type	Sick call	
	Scheduled Date	08/26/2006	
	Encounter Date	08/26/2006	
Vitals	Blood Pressure	175	83
	Pulse	63	
	Respiration	20	
	Temperature	98.6	
	Pain Level	5	
Labs	Order ID	20060826TB20008	
	Lab Performed Date/Time	08/26/2006	07:45 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
	Next Encounter Date	09/01/2006	1000
	Next Encounter Type	Sick call	
Workflow	Completed When	08/26/2006	07:55 pm
Assigned To	Erica Graham, RN		

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

Scrip5 Labs Required	No
for R [illegible]	Yes
Scrip5 KOP	No
Scrip5 Travel Pack	

08/28/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Bonnie Saylor, NP
Patient: FRANCISCO CASTANEDA
Description: Sick Call
Text: S: Sick call presentation: "I have stress and can't sleep, I need medication." Pt indicates his stress is due to a chronic medical problem which the CCA has refused to have corrected as it is considered to be elective surgery. Mean while he still has symptoms which are depressing. Pt has other personal problems as well and states he needs a sleep aid to finish his time in here.

O: Adult male, NAD. Appears well, A&O. PE deferred.

A: c/o stress with need for tx

P Trazedone, 60 mg. 1 tab po now, then 1 tab po q hs. #28, 0 refill

-psych consult
-Pt ed re: sleep hygiene. RTC pm. Pt states that he understands. b saylor, NP_C

	Encounter Type	Sick call	
	Scheduled Date	08/27/2006	
	Encounter Date	08/27/2006	
	Allergy	NKA	NKA
Labs	Order ID	200608274EA0105	
	Lab Performed Date/Time	08/27/2006	11:51 PM

Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	08/28/2006	12:03 am

Assigned To Bonnie Saylor, NP

[EXHIBIT 23]

(Filed Feb. 11, 2008)

[SEAL]

San Diego Medical Referral Center
PO Box 438150
San Diego, CA 92143-9020
Tel: (619) 710-8339
Fax: (619) 661-6042

To:	**Mr. Castaneda, Francisco (A#: 94-149-233)**
From:	**LCDR Gonsalves, Health Service Administrator**
Date:	**August 30, 2006**
Subject:	**Specialty Care**

This is to inform that the off-site specialist you were referred to for your medical condition reports that any surgical intervention for the condition would be elective in nature. An independent review by our

medical team is in agreement with the specialist's assessment. The care you are currently receiving is necessary, appropriate and in accordance with our policies.

[EXHIBIT 24]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

09/08/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Joanne Galano, RN
Patient: FRANCISCO CASTANEDA
Description: RN Sick call – remote
Text: S: sick call request received: "I have a lot pain and I'm having discharge."
today: pain 5/10 – comes and goes, pain – "pinching" at tip of penis
using Ibuprofen 800 mg, "it's the same, a 5" – no effect
has white discharge at night
"It's like getting worse. It's like genital warts, but they're getting bigger."
Also asking about sleeping pills; was told he was going to get some.

O: penis not observed (sick call done in housing area – in locked down unit); VS WNL; T 98.5F; a/o x 3; no facial grimacing

A: Potential alt. health maintenance

P: Reviewed chart; seen for poor sleep and was started on Trazedone at bedtime; has been seem numerous times for penile complaints.

Chart Review to PCP re: patient's reported "worsening" of this condition.

	Encounter Type	Sick Call	
	Scheduled Date	09/08/2006	
	Encounter Date	09/08/2006	
Vitals	Blood Pressure	123	91
	Pulse	66	
	Respiration	18	
	Temperature	98.5	
	Pain Level	5	pinching
Assessment	Nurse Diagnosis	50	Health maintenance, altered
Labs	Order ID	20060908 OCO0012	
	Lab Performed Date/Time	09/08/2006	02:36 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	09/08/2006	02:42 pm
Assigned To	Joanne Galano, RN		

[EXHIBIT 25]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

Scrip3 KOP	Yes	
Scrip3 Travel Pack	No	
Scrip4 Prescription Type	Routine	Routine
Scrip4 Start Date	09/26/2006	
Scrip4 Labs Required for R	No	
Scrip4 KOP	Yes	
Scrip4 Travel Pack	No	
Scrip5 Prescription Type	Routine	Routine
Scrip5 Start Date	09/26/2006	
Scrip5 Labs Required for R	No	
Scrip5 KOP	Yes	
Scrip5 Travel Pack	No	

09/26/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Encounter
Text: S: pt being followed for penile wart that has been evaluated by outside specialist.

O: another condyloma type lesion is forming and foul odod [sic] emitting from uncircumcized area with mushroomed wart.

A: condyloma acuminata

P: amoxicillin rx
discussed with health care team and ICE, pt is mandatory hold due to legal status
will continue to monitor

	Encounter Type	Chronic Appointment	
	Scheduled Date	09/26/2006	1000
	Encounter Date	09/26/2006	
	New Allergies?	No	
	Med/Psych Alerts?	No	
	CXR Required?	No	No CSR Encounter or Results
	PPD Required?	No	
	Chronic Type 1	Other	
Labs	Order ID	20060922 AJR0035	
	Lab Performed Date/Time	09/22/2006	10:27 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	09/26/2006	01:33 pm

[EXHIBIT 26]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

10/05/06 – Scanned Document
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San
FRANCISCO Diego, CA 20060327

Document: pre ops scrips 10/05/06
Author: Juliet E. Brandel
MRT
To: FRANCISCO CASTANEDA

** This document must be manually printed for inclusion in the overall document

10/17/06 – Period of Custody Note
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San
FRANCISCO Diego, CA 20060327

Consultant: Cindy Butler, RN
Contact:
Description:
Text: CCA D control officer called and stated this detainee said he has blood coming out of his penis. CCA officer saw some dried blood on his boxers. Chart reviewed reveals chronic condition. Instructed to place sick call.

10/19/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Pt has sent multiple requests for sick c
Text: Pt has sent multiple requests for sick call evaluation. Spoke with URC and will submit TAR for elective surgery.

Encounter Type	Other	
Scheduled Date	10/19/2006	
Encounter Date	10/19/2006	
New Allergies?	No	
Med/Psych Alerts?	No	
CXR Required?	No	No CXR Encounter or Results
PPD Required?	No	

[EXHIBIT 27]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

10/23/06 – Chart Review
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Review Complete
Author: Anthony A. Walker
Patient: FRANCISCO CASTANEDA
Description: Personal Request to be seen by you
Text: O: Responded to a medical complaint for placing sick calls multiple times without being seen. Requested detainee be brought to medical. Upon arrival, detainee asked to be seen by PA Walker who he has seen before and because of the nature of his problem (penile discharge) is willing to wait to see him.

A: altered health maint r/t penile discharge

P: Explained to detainee that I will make PA Walker aware of his request to see him for his medical condition. Agreed to wait further to be seen.

A:

P: TAR PLACED AND IS CURRENTLY PENDING REVIEW FOR SURGERY.

Chart Review Type Standard
Review Position Noted
Assigned To Anthony A. Walker

11/09/06 - Pharmacy Fulfillment
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Fully Disbursed
Author: Cindy Butler, RN
Patient: FRANCISCO CASTANEDA
Description: Docusate sodium
Text:

	Order Date	11/09/2006	
	Order ID	200611094G90040	
Pharmacy	Drug Code	no data	no data
	Prescription Type	Routine	Routine

[EXHIBIT 28]

Division of Immigration Health Services

Treatment, Authorization & Consultation Form

(Filed Feb. 11, 2008)

SEND PAPER CLAIMS TO:

Immigration Health Services
1220 L Street, NW
PMB 468
Washington, DC 20005-4018

For EDI claim submission information and claim inquiries, please contact 1.800.479.0529

Claims must he submitted within six months from date of health service.

For proper provider claim submission information, please visit: www.inshealth.org/ProviderInfo.htm

A separate treatment authorization request will be required for services beyond and outside the scope of the original authorization. Services rendered may not be paid without an approved authorization. All

payment for services is subject to detainees' eligibility and custody. Unless otherwise specified, payment for DIHS' authorized health services is made in accordance with US Code Title 18, Part 3, Chapter 301, Sec. 4006. For all non-emergency authorized health services this TAR is valid for 45 days after the date of issue and cannot be used for health services rendered prior to the date of issue. All claims are subject to retrospective review. For further information regarding DIHS, please visit our website: www.insheath.org or contact the Immigration Health Services' Managed Care Branch at 1.888.718.8947, M-F 8AM-6PM EST.

IMPRINT OR DETAINEE ID PLATE, COMPUTER LABEL OR COMPLETE BELOW:	
1. Name: Last, First CASTANEDA, FRANCISCO	1b. Alias: Last, First
2. DOB: 02/10/1972	3. ID Number 094149233
3. Nationality EL SALVADOR	5. Facility DIHS San Diego, CA 619.710.8347

AUTHORIZED ACTION:

Status: Denied **TAR #: 2006/10/19/188300**

Authorizer: Neal Collins/Claudia Mazur, RN, CCM
Service Type: Non-Emergency
Referral Type: 22

To: *(Name and Phone to whom referral is being made)*

Dialogue of Request:

Discussed with the DIHS Staff Physician. Circumcisions are not a covered benefit.
Updated by Claudia Mazur, RN, CCM on Wednesday, October 25, 2006.

34yo El Salvadoran male with 3 year history of genital wart on uncircumsized penis. Pt has developed a moderate sized condyloma to the glans penis and another one is developing within the foreskin. Pt has subsequent infections, bleeding due to very tight foreskin, some dysuria but has been functioning in the past, and foul odor but no sign of infection. Pt has been seen by local urologist and oncologist and both are not impressed of possible cancerous lesion(s), however, there is an elective component to having the circumcision completed. Pt has been submitting several requests for sick call that when evaluated there is not much else left to be done. Pt is demanding surgical treatment but is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite a while.

Provisional Diagnosis:

078.11 CONDYLOMA ACUMINATA

Consultation Report:

TAR Appeals: To appeal a decision of DIHS to not authorize a service, a detention facility must submit a TAR Appeal through the TAR process and include the following information: a) "TAR Appeal", b) TAR number and other information from TAR being appealed, c) requested action, and d) justification for the requested action."

Instructions for Usage of Treatment Authorization And Consultation Form

Referral Type Descriptions:

Consult Only – Consultative health services only that are consistent with the consultative Provider's specialty and detainee's medical condition.

Emergency Room – Health services consistent with an Emergency Room setting and detainee's specified medical condition. In cases where an inpatient admission may be medically necessary following an initial Emergency Room visit; a new TAR must be submitted by the detainee's custodial facility.

Medical Appointment (Not a consult) – Health services consistent with the Provider's specialty and detainee's specified medical condition.

Medical Lab/Test – Labs and/or Tests consistent with the detainee's specified medical condition.

Inpatient Hospitalization – Health services consistent with an inpatient hospitalization and the detainee's specified medical condition.

Dental Services – Health services consistent with a dental Provider's specialty and detainee's specified medical condition.

Non-Formulary Medications – Any medication not included on DIHS' designated formulary www.inshealth.org/comments/Formulary/DIHS/Formulary.pdf

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[EXHIBIT 29]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

11/09/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: Cindy Butler, RN
Patient: FRANCISCO CASTANEDA
Description: Sick call
Text: S: Brought up for RN sick call. States that he was hoping to see LT Walker. "He knows all about me." States that his symptoms have worsened. State he feels a constant pinching pain, especially at night. States he constantly has blood and discharge on his shorts. "It's getting worse, and I don't even have any meds – nothing for pain and no antibiotics." Also complains of a swollen rectum which he states make bowel movements hard? "Can I get some of that milk of magnesia stuff?"

O: 97.9, RR 16, BP 120/86, HR 54, penile exam deferred (detainee prefers to wait for male examiner)

A: ALtered comfort

P: Milk of magnesia 30 ml po times one now. Docusate sodium 100 mg po bid times seven days. Instructed detainee to drink adequate fluid. Informed that TAR in place for surgery and is pending approval. Informed: Will refer to midlevel provider. Voiced understanding.

	Encounter Type	Sick Call	
	Scheduled Date	11/09/2006	
	Encounter Date	11/09/2006	
	New Allergies?	No	
	Med/Psych Alerts?	No	
	CXR Required?	No	No CXR Encounter or Results
	PPD Required?	No	
Labs	Order ID	200611094 G90039	
	Lab Performed Date/Time	11/09/2006	03:57 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
Workflow	Completed When	11/09/2006	04:15 pm
Assigned To	Cindy Butler, RN		

[EXHIBIT 30]

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

11/14/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: David Lusche, PA
Patient: FRANCISCO CASTANEDA
Description: RN Sick Call Referral
SUBJECTIVE:
Evening SICK CALL in D/N unit.
Patient complains of new, 2nd penile lesion on underside, distal penis. Patient complains his penile lesions stain his underwear. Since he receives 4 fresh pairs of underwear per week, he requests assistance to obtain more fresh underwear.
Patient denies dysuria, penile discharge, or other urinary symptoms.

OBJECTIVE:
GENERAL: Appears NIAD
Abdominal/genital exam deferred until clinic appointment.

ASSESSMENT:
Penile Wart, by PMH

PLAN:
Scheduled for f/u exam in clinic within 2 days.

	Encounter Type	Sick Call	
	Scheduled Date	11/14/2006	
	Encounter Date	11/14/2006	
	New Allergies?	No	
	Med/Psych Alerts?	No	
	CXR Required?	No	No CXR Encounter or Results
	PPD Required?	No	
Vitals	Pain Level	0	
Labs	Order ID	200611148 E60082	
	Lab Performed Date/Time	11/14/2006	11:26 PM
Next Encounter	Chart Review Required?	No	
	Chart Review Type	Standard	
	Next Encounter Date	11/15/2006	1400
	Next Encounter Type	Medical	
Workflow	Completed When	11/14/2006	11:29 pm

Division of Immigration Health Services

Alien EMR All Record Print

(Filed Feb. 11, 2008)

11/15/06 – Encounter
Alien#: 094149233 Name: FRANCISCO CASTANEDA
Case ID: 20060327QOT0005 Description: DIHS San FRANCISCO Diego, CA 20060327

Status: Complete
Author: David Lusche, PA
Patient: FRANCISCO CASTANEDA
Description: Medical
Text: Sick Call follow up for examination of penile lesion

SUBJECTIVE:
Patient seen for visual inspection of penile lesion first noted in ~2004.
Patient expresses concern that his lesion "is growing." Patient states that the lesion is moist and stains his boxer shorts which are replaced approx. once q2 days. Patient states he cannot stand and urinate, because the urine "sprays everywhere" and he cannot direct the stream.

OBJECTIVE:
VS: Weight 237 lbs.
GENERAL: Patient calm, NIAD.
GU: Genital wart on distal glans penis. Patient uncircumcized. Wart is white in color, moist in appearance, approx. 2.5 cm diameter, centered at the dorsal-left lateral aspect of the distal glans penis.

Urethra is patent. No discharge from urethra noted. Underwear is stained in multiple areas in front, in color light pink.

ASSESSMENT:
Condyloma Acuminata

PLAN:
Special Needs: clothing – request for issue of 7 pairs of cleaned boxer shorts weekly (i.e. one daily; versus norm of 4 pairs weekly)
Further treatment f/u of this condition is being provided for by PCP; f/u as required or scheduled.

	Encounter Type	Medical	
	Scheduled Date	11/15/2006	1400
	Encounter Date	11/15/2006	
	New Allergies?	No	
	Med/Psych Alerts?	No	
	CXR Required?	No	No CXR Encounter or Results
	PPD Required?	No	
	Chronic Type 1	[> The code {E7C41A	[> The code {E7C41A86-1348-4F4F-922[
Vitals	Weight	237	
	Pain Level	1	

Labs	Order ID	200611148 E60083
	Lab Performed Date/Time	11/14/2006 11:27 PM
Next Encounter	Chart Review Required?	No

[EXHIBIT 31]

Division of Immigration Health Services

Treatment, Authorization & Consultation Form

(Filed Feb. 11, 2008)

SEND PAPER CLAIMS TO:

Immigration Health Services
1220 L Street, NW
PMB 468
Washington, DC 20005-4018

For EDI claim submission information and claim inquiries, please contact 1.800.479.0529

Claims must be submitted within six months from date of health service.

For proper provider claim submission information, please visit: www.inshealth.org/ProviderInfo.htm

A separate treatment authorization request will be required for services beyond and outside the scope of the original authorization. Services rendered may not

be paid without an approved authorization. All payment for services is subject to detainees' eligibility and custody. Unless otherwise specified, payment for DIHS' authorized health services is made in accordance with US Code Title 18, Part 3, Chapter 301, Sec. 4006. For all non-emergency authorized health services this TAR is valid for 45 days after the date of issue and cannot be used for health services rendered prior to the date of issue. All claims are subject to retrospective review. For further information regarding DIHS, please visit our website: www.inshealth.org or contact the Immigration Health Services' Managed Care Branch at 1.888.718.8947, M-F 8AM-6PM EST.

IMPRINT OR DETAINEE ID PLATE, COMPUTER LABEL OR COMPLETE BELOW:	
1. Name: Last, First CASTANEDA, FRANCISCO	1b. Alias: Last, First
2. DOB: 02/10/1972	3. ID Number 094149233
3. Nationality EL SALVADOR	5. Facility DIHS San Pedro, CA 310.241.2366

AUTHORIZED ACTION:

Status: Approved **TAR #: 2006/12/04/687800**

Authorizer: Claudia Mazur, RN, CCM/
Claudia Mazur, RN, CCM
Service Type: Non-Emergency
Referral Type: 11

To: *(Name and Phone to whom referral is being made)*

Dialogue of Request:
Approved for Urology consult only. Please submit treatment plan and clinical assessment if other care recommended.

Updated by Claudia Mazur, RN, CCM on Tuesday, December 05, 2006.

Requesting Urology consult with *Lawrence Greenburg*, MD, (310 832-2697) TBS. Has Hx severe HPV infection causing large, painful penile warts. has bleeding and pain from the lesions. May also have an underlying structural deformity of penis. Reports filed case with 9th Circuit. Henneford

This event's case was created by TARweb and should be verified for data correctness.

The following provider information was entered manually:

Provider ID: 000
Provider Name: Lawrence Greenburg
Provider Specialty Code: URZ
Provider Specialty Description: UROLOGY
Provider Facility Type: Medical Clinic

Provider Type: MD
Provider Address 1: 23326 Hawthorne Blvd
Provider Address 2:
Provider City: Torrance
Provider State: CA
Provider Zip: 90732
Provider Phone: 310 832-2697

Provisional Diagnosis:

078.1 VIRAL WARTS

Consultation Report:

TAR Appeals: To appeal a decision of DIHS to not authorize a service, a detention facility must submit a TAR Appeal through the TAR process and include the following information: a) "TAR Appeal", b) TAR number and other information from TAR being appealed, c) requested action, and d) justification for the requested action."

Instructions for Usage of Treatment Authorization And Consultation Form

Referral Type Descriptions:

Consult Only – Consultative health services only that are consistent with the consultative Provider's specialty and detainee's medical condition.

Emergency Room – Health services consistent with an Emergency Room setting and detainee's specified medical condition. In cases where an inpatient admission may be medically necessary following an initial Emergency Room visit; a new TAR must be submitted by the detainee's custodial facility.

Medical Appointment (Not a consult) – Health services consistent with the Provider's specialty and detainee's specified medical condition.

Medical Lab/Test – Labs and/or Tests consistent with the detainee's specified medical condition.

* * *

[EXHIBIT 32]

Division of Immigration Health Services	**Treatment, Authorization & Consultation Form**

(Filed Feb. 11, 2008)

SEND PAPER CLAIMS TO:
Immigration Health Services
1220 L Street, NW
PMB 468
Washington, DC 20005-4018

For EDI claim submission information and claim inquiries, please contact 1.800.479.0529

Claims must be submitted within six months from date of health service.

For proper provider claim submission information, please visit: www.inshealth.org/ ProviderInfo.htm

A separate treatment authorization request will be required for services beyond and outside the scope of the original authorization. Services rendered may not be paid without an approved authorization. All payment for services is subject to detainees' eligibility and custody. Unless otherwise specified, payment for DIHS' authorized health services is made in accordance with US Code Title 18, Part 3, Chapter 301, Sec. 4006. For all non-emergency authorized health services this TAR is valid for 45 days after the date of issue and cannot be used for health services rendered prior to the date of issue. All claims are subject to retrospective review. For further information regarding DIHS, please visit our website: www.inshealth.org or contact the Immigration Health Services' Managed Care Branch at 1.888.718.8947, M-F 8AM-6PM EST.

IMPRINT OF DETAINEE ID PLATE, COMPUTER LABEL OR COMPLETE BELOW:	
1. Name: Last, First Castaneda, Francisco	1b Alias: Last, First
2. DOB: 02/10/1972	3. ID Number 094149233
4. Nationality: EL SALVADOR	5. Facility:

AUTHORIZED ACTION:
Status: Complete TAR #:
Authorizer: Jeffry Brinkley NP/
Service Type:
Referral Type:

To: (*Name and Phone to whom referral is being made*)

Dialogue of Request:
S. Penile lesion
O. See Dr. Greenberg's consult
A. Penile lesion, etiology unknown
P. Reassure. Consulted with Dr. Collins, verbally approved TAR
To See Dr. Asghar Askari on Friday @ 1360 W. 6th Street, Suite 160, San Pedro, CA 90732.
Tele: 310-519-9180
Dr. Taub's sec. Loretta notified.

Provisional Diagnosis:

Consultation Report:

pt has fungating penile lesion with left inguinal lymphadenopathy

He needs biopsy of penile lesion first + Ceftin 500 mg 1 tablet bid # 10 days /s/ Asghar Askari A ASKARI

TAR Appeals: To appeal a decision of DIHS to not authorize a service, a detention facility must submit a TAR Appeal through the TAR process and include the following information: a) "TAR Appeal", b) TAR number and other information from TAR being

appealed, c) requested action, and d) justification for the requested action."

Instructions for Usage of Treatment Authorization And Consultation Form

Referral Type Descriptions:

Consult Only – Consultative health services only that are consistent with the consultative Provider's specialty and detainee's medical condition.

Emergency Room – Health services consistent with an Emergency Room setting and detainee's specified medical condition. In cases where an inpatient admission may be medically necessary following an initial Emergency Room visit; a new TAR must be submitted by the detainee's custodial facility.

Medical Appointment (Not a consult) – Health services consistent with the Provider's specialty and detainee's specified medical condition.

Medical Lab/Test – Labs and/or Tests consistent with the detainee's specified medical condition.

Inpatient Hospitalizations – Health services consistent with an inpatient hospitalization and the detainee's specified medical condition.

Dental Services – Health services consistent with a dental Provider's specialty and detainee's specified medical condition.

Non-Formulary Medications – Any medications not included on DIHS' designated formulary

www.inshealth.org/documents/formulary/DIHS_Formulary.pdf

[EXHIBIT 33]

Asghar Askari, M.D.
1360 W. 6th Street #160
San Pedro, Ca. 90732
(310)519-9180
A(310)519-0225 Fax

January 25, 2007

Re: Francisco Castaneda

I saw Mr. Castaneda in my office today for a consultation. Upon exam it revealed Fungating with penile lesion with poss left lymphadenectomy, most likely penile cancer.

He should be started on Ceftin 500mg 1 tablet two times a day for 10 days. He should be scheduled for a penile Biopsy. My office will get authorization and schedule this as anout-pt at the hospital under general anathesia [sic]. He will then need further follow-up after the procedure is performed. Thank you.

Sincerely Yours,

/s/ Asghar Askari
Asghar Askari, M.D.

/s/ [Illegible]
Jeffry [Illegible]
Nurse Practitioner
1-27-09

[EXHIBIT 34]

DIHS Detainee Covered Services Package

(Filed Feb. 11, 2008)

The Division of Immigration Health Services (DIHS) provides health care benefits for persons in the custody of Immigration and Customs Enforcement (ICE) and Border Patrol (BP) that are in addition to the contracted minimum scope of services provided by a detention facility. This document is not meant to be interpreted as all inclusive; each request is reviewed by medical professionals on a case by case basis.

The DIHS Detainee Covered Services Package primarily provides health care services for emergency care. Emergency care is defined as "a condition that poses an imminent threat to life, limb, hearing, or sight." Accidental or traumatic injuries incurred while in the custody of ICE or BP and acute illnesses will be reviewed for appropriate care.

Other medical conditions which the physician believes, if left untreated during the period of ICE/BP custody, would cause deterioration of the detainee's health or uncontrolled suffering affecting his/her deportation status will be assessed and evaluated for care.

All health care services for which a claim for payment is submitted to DIHS require authorization, **unless the service or category of services is explicitly exempt from and authorization requirement.**

Elective, non-emergent care requires prior authorization. DIHS must be notified of emergency care services within 1 business day of occurrence.

Requests for pre-existing, non-life threatening conditions, will be reviewed on a case by case basis. All medical service requests should have correlating clinical signs and symptoms.

Detainee transfers from one hospital to another hospital require prior authorization, unless deemed an emergency. Transfers will usually be approved if the accepting facility is able to offer care/services not available at the original facility.

Failure to submit a Treatment Authorization Request (TAR) for medical services within the time frames established by DIHS **will result in payment denial**.

Providers may request an appeal of any denied service by the submission of appeal documentation.

NOTE:

Information contained herein the DIHS' web site is intended to provide general information only and should not be construed as definitive and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party or person in any matter civil or criminal.

DIHS health benefits and limitations are subject to all applicable state and federal laws and regulations,

which are subject to change. In addition, DIHS's health benefits are subject to the imposition of policy limits and exclusions. For more information concerning DIHS' health benefit requirements and limitations, please consult your applicable DIHS Managed Care Coordinator. (www.inshealth.org/managedcare.htm)

Allergy/Clinical Immunology

Scheduled, non-emergency allergy/immunology services are not a covered benefit. Requests will be reviewed on a case by case basis.

The following are examples of commonly requested procedures usually **not covered** but can be requested by submitting a TAR in the event of an emergency situation.

Allergy testing and treatment

Medical conference services for allergy

Professional services for allergen immunotherapy

Provocative test

Cardiology

Cardiology service requests may be authorized for emergent care. Scheduled, non-emergent or work up procedures and or testing is not covered. All requests are reviewed on a case by case basis.

The following are commonly requested procedures usually not covered but can be requested by a TAR in the event of an emergency.

Cardiac rehabilitation; not covered

Non-emergency cardiac catherization require prior approval by the Medical Director/Designee.

Non-emergency Electrocardiograms (EKG) with interpretation should be provided on-site @ the detention facilities.

Non-emergency coronary artery bypass surgery

Non-emergency insertion of pacemaker or any other implants

Non-emergency angioplasty (with or without insertion of stents)

Dental

An initial dental screening is conducted within 14 days of admission, unless completed within the last six months, to include instructions on dental hygiene. This is considered part of the intake process and does not require a separate authorization.

Dental services are provided for emergent care and the relief of pain and suffering. Request for authorization is required within 1 business day of the event.

Non-emergent care requires prior authorization

Orthodontics is not a covered service.

All requests are reviewed on a case by case basis.

The following procedures **are covered** under dental services, once authorization is obtained.

- Generally, routine/non-emergent dental examinations are approved for detainees who have been in ICE/BP custody 12 months, supported by narrative and diagnostic x-rays, if necessary.
- Treatment of dental pain; sedative fillings, extractions of non-restorable teeth, gross debridement of symptomatic areas for inmates in custody less than 12 months.
- Repair of partials or dentures must have documentation of inability to maintain sufficient caloric intake and approval by a DIHS Dental Consultant.
- Treatment plan with x-rays for those inmates who request care with more than 12 months detention.
- Development of an individualized treatment plan for each inmate receiving dental care.
- Consultation and referral to dental specialist, including oral surgery, when necessary.

Forensic dental exams for age determinations

- must be ordered by ICE/BP Officer **AND**
- the requesting agency has a need for this information

Digestive System

Digestive system service requests may be authorized for emergent care. Scheduled, non-emergent or work up procedures and or testing is not covered. All requests are reviewed on a case by case basis.

The following are commonly requested procedures that are **not covered** but can be requested by a TAR in the event of an emergency.

Adenoidectomy

Hiatal hernia repair

Fissurectomy or Fistulectomy

Gastric bypass for morbid obesity

Gastroplasty for morbid obesity

Hernia repair; unless non-reducible, incarcerated or strangulated

Hemorrhoidal surgery (internal or external)

Testing for H pylori

Tonsillectomy

Ear, Nose and Throat

Ear, nose and throat service requests may be provided for emergent care. Scheduled, non-emergent or work up procedures and or testing is not covered. All requests are reviewed on a case by case basis.

The following are commonly requested procedures that are **not covered** but can be requested by a TAR in the event of an emergency.

Adenoidectomy

Tonsillectomy

Tympanoplasty

Endocrinology

Endocrinology service requests may be provided for emergent care. Scheduled, non-emergent, work up procedures and or testing is not covered. All requests are reviewed on a case by case basis.

General Surgery

Scheduled, non-emergent surgical services are not a covered benefit. Requests will be reviewed on a case by case basis.

Any operative procedure or any portion of a procedure performed primarily to improve physical appearance and/or treat a mental condition through change in bodily form is **not covered**.

The following are examples of commonly requested procedures that are **not covered** but can be requested in the event of an emergency situation. Also reference each individual body system for additional information.

Autologous blood donations, pre-surgical

Non-emergency pacemaker insertion, or insertion of any other implants, unless determined by a physician to be immediately necessary to preserve life.

Non-emergency hemiorrhaphy

Oral and maxillofacial surgery, unless required as a result of injury incurred while in the custody of ICE/BP

Plastic surgery

Reconstructive surgery, unless required as a result of injury incurred while in the custody of ICE/BP

Removal of implant material

Stand-by surgeons

Surgical treatment for morbid obesity

Surgical correction of congenital anomalies

Eye Surgery

Blepharoptosis repair

Canthoplasty

Cataract surgery

Cataract removal

Closure of lacrimal punctum

Conjunctivodacryocystotomy

Conjunctivorhinostomy

Corneal relaxing incision

Corneal wedge resection

Correction of lid retraction

Correction of everted punctum

Epikeratoplasty

Keratomileusis

Keratophakia

Keratoprosthesis

Modification of ocular implant

Photorefractive keratectomy

Plastic repair of canaliculi

Pterygium, removal of

Radial keratotomy

Reconstruction of eyelid

Reduction of overcorrection of ptosis

Release of extensive scar tissue

Removal or revision of orbital implant

Strabismus surgery

Transposition extraocular muscle

Ear, Nose and Throat Surgery

Adenoidectomy

Excision of soft tissue lesion of the ear

Excision of exostosis

Excision of tonsil tags

Functional reconstruction of the internal nose

Insertion of nasal septal prosthesis

Lysis of intranasal synechia

Myringotomy with or without tubes

Orthognathic surgery

Repair of oronasal fistula

Rhinoplasty

Septoplasty or submucous resection

Tonsillectomy

Treatment for temporomandibular joint dysfunction and disorders, including surgery and appliances

Tympanoplasty

Cardiovascular System Surgery

Non-emergency angioplasty

Non-emergency coronary artery bypass surgery

Non-emergency pacemaker insertion, or insertion of any other implants, unless determined by a physician to be immediately necessary to preserve life and approved by DIHS Managed Care Unit.

Varicose vein ligation, division, excision, or stripping

Orthopedic Surgery

Arthrocentesis

Arthroplasty

Arthroscopy-surgical

Arthrotomy

Bone graft

Carpal tunnel decompression

Condylectomy

Diagnostic athroscopy, with or without biopsy

Disc repair

Foot surgery, including bunionectomy

Hammertoe operation, for cock-up fifth toe

Joint reconstruction

Ligament release of tarsal tunnel

Myotomy

Non-emergency limb amputation

Non-emergency reconstruction of the mandible

Orthognathic surgery

Osteoplasty for orthognathic deformities

Osteoplasty of ramus, with or without bone graft

Osteotomy of the body of the mandible

Osteotomy-segmented or subapical-per sextant or quadrant

Partial ostectomy

Radical resection of mandible with bone graft

Reconstruction of cleft foot

Reconstruction of the toe

Skin grafts

Surgical discectomy; with or without implant

Synovectomy

Transosseous implant

Transseptal fiberotomy

Integumentary System Surgery (Skin, Subcutaneous and Breast)

Acne surgery

Arthoscopy of the temporomandibular joint

Arthroplasty

Augmentation of the mandibular body or angle

Blepharoplasty

Bone graft, nasal maxillary and malar areas

Breast reconstruction

Carpal tunnel decompression

Cartilage graft

Cervicoplasty

Condylectomy of the temporomandibular joint

Coronoidectomy

Correction of inverted nipples

Excision of excessive skin

Fascia lata graft

Foot surgery, including bunionectomy

Genitopiasty

Graft for facial nerve paralysis

Hair transplant

Hammertoe operation, for cock-up fifth toe

Immediate insertion of breast prosthesis after mastectomy

Insertion of tissue expander

Insertion of contraceptive capsules

Ligament release of tarsal tunnel

Mammoplasty

Mastectomy for gynecomastia

Mastopexy

Meniscectomy of the temporomandibular joint

Muscle resection

Nipple/areola reconstruction

Nipple exploration

Non-emergency back (disc) surgery

Non-emergency reconstruction of the mandible

Non-emergency herniorrhaphy

Osteotomy of the facial bones

Osteotomy of the mandible

Periprosthetic capsulectomy, breast

Reconstruction of nail bed

Reconstruction of cleft foot

Reconstruction of the toe

Reconstructive surgery

Reduction of the forehead

Removal by contouring of a benign tumor of the facial bone

Removal of tissue expander

Removal of sutures under anesthesia

Removal of intact mammary implant

Removal of contraceptive capsules

Replacement of tissue expander

Revision reconstructed breast

Rhytidectomy

Skin graft

Submucosal resection

Subperiosteal implant

Suction assisted lipectomy

Tissue graft

Treatment for temporomandibular joint dysfunction and disorders, including surgery and appliances

Digestive System Surgery

Anterior gastropexy for hiatal hernia

Excision tonsil tags

Frenoplasty

Gastric bypass for morbid obesity

Gastroplasty for morbid obesity

Hemorrhoidal surgery

Revision of colostomy

Surgical treatment for morbid obesity

Vermilionectomy, with mucosal advancement

Urinary System Surgery

Revision of ileostomy

Female Genital System Surgery

Construction of artificial vagina

Dilation of vagina under anesthesia

Excision of vaginal septum

Fimbrioplasty

Genitoplasty

Hymenotomy, simple incision

Hysteroplasty to repair uterine anomaly

Intersex surgery, female to male

Intersex surgery, male to female

Ligation or transection of fallopian tubes

Non-emergency hysterectomy

Plastic repair of introitus

Oophorectomy

Reversal of surgically induced sterility

Salpingostomy or Salpingectomy

Transcervical introduction of fallopian tube catheter

Transection of fallopian tube, minilaparotomy

Transposition of ovary

Tubotubal anastomosis

Voluntary sterilization

Male Genital System Surgery

Circumcision

Epididymovasostomy, anastomosis epididymis to vas deferens

Excision, penile plaque

Genitoplasty

Insertion penile prosthesis

Insertion of testicular prosthesis

Intersex surgery, female to male

Intersex surgery, male to female

Ligation of vas deferens

Plastic operation on penis to correct angulation

Prostatectomy

Removal/repair/replacement of penile prosthesis

Repair of hypospadias complications

Reversal of surgically induced sterility

Surgical correction of abnormality in penile prosthesis

Transurethral balloon dilation, prostatic urethra

Vasectomy

Vasovasotomy, vasovasorrhaphy

Voluntary sterilization

Nervous System Surgery

Burr holes, implantation neurostimulator electrodes

Craniectomy, implantation neurostimulator electrodes

Incision/subcutaneous placement neurostimulator generator/receiver

Incision and subcutaneous placement/cranial neurostimulator

Incision/subcutaneous placement neurostimulator generator/receiver

Laminectomy, implantation neurostimulator electrodes

Percutaneous implantation neurostimulator electrodes

Revision/removal spinal neurostimulator generator/receiver

Revision or removal/cranial neurostimulator

Revision/removal peripheral neurostimulator electrodes

Revision/removal intracranial neurostimulator electrodes

Revision/removal peripheral neurostimulator generator/ receiver

Hearing

Hearing services may be provided for emergent care. Scheduled, non-emergent, work up procedures and/or testing is not covered. All requests are reviewed on a case by case basis.

Hearing testing/screening is not covered. The repair of, replacement or supplies for a hearing aid is **not a covered benefit**.

Hemolytic and Lymphatic System

Hemolytic and lymphatic system service requests may be provided for emergent care. Scheduled, non-emergent, work up procedures and or testing is not covered. All requests are reviewed on a case by case basis.

Integumentary System (skin, subcutaneous and breast)

Integumentary system services may be provided for emergent care. Scheduled, non-emergent or work up procedures and testing are not covered. All requests are reviewed on a case by case basis

The following are commonly requested procedures that are **not covered**, but can be requested by a TAR in the event of an emergency.

Acne surgery; acne medication

Arthroplasty

Body piercing or removal; including removal of self inserted genitalia objects (unless obvious signs/ symptoms of active infection)

Dermabrasion

Dressing change under anesthesia

I.V. injection of agent to test blood flow in skin flap

Immediate insertion of breast prosthesis after mastectomy

Impression/custom preparation of prosthesis

Insertion of tissue expander

Mammoplasty

Mastectomy for gynecomastia

Reconstruction of cleft foot

Reconstructive surgery

Removal of skin tags/lipomas

Removal of tissue expander

Tattooing or removal

Treatment for temporomandibular joint dysfunction and disorders, including surgery and appliances

Investigational (Experimental) Drugs, Devices and Procedures

Investigational or experimental drugs, devices and procedures are **not a covered benefit**. All requests are reviewed on a case by case basis.

For procedures, services, and supplies that are experimental or investigational, and/or not approved by the FDA, or if the prisoner is taking an investigational drug on a compassionate use basis at the time of arrest, he or she may continue as long as it involves no cost to the government, and as long as the investigational protocol does not require the prisoner to make visits anywhere outside of the facility to which he or she is confined.

Male Genital System

Scheduled, non-emergency services are not a covered benefit. Requests will be reviewed on a case by case basis.

The following are examples of commonly requested procedures that are **not covered**, but can be requested in the event of an emergency.

Body piercing or removal; including removal of self inserted genitalia objects (unless obvious signs/ symptoms of active infection)

Circumcision

Epididymovasostomy, anastomosis epididymis to vas deferens

Excision, penile plaque

Insertion penile or testicular prosthesis

Intersex surgery, female to male; male to female

Ligation of vas deferens

Plastic operation on penis to correct angulation

Procedures, services and supplies related to sex transformations

Removal/repair/replacement of penile prosthesis

Repair of hypospadias complications

Reversal of surgically induced sterility; Voluntary sterilization

Transurethral balloon dilation, prostatic urethra

Vasectomy

Vasovasotomy, vasovasorrhaphy

Nervous System

Scheduled, non-emergency services are not a covered benefit. Requests will be reviewed on a case by case basis.

The following are examples of commonly requested procedures that are **not covered**, but can be requested in the event of an emergency.

Most implantation and placement of neurostimulators generators/receivers.

Obstetrics/Gynecology

Scheduled, non-emergency services are usually not a covered benefit. Requests will be reviewed on a case by case basis.

Pre-natal obstetrical physician visits are approved but require a prior authorization.

Routine sonograms to determine fetal age and/or size will be considered for initial gestation determination. Additional requests will be based upon clinical findings.

There is no financial reimbursement benefit for a newborn baby.

Routine physical examinations, including PAP smears (if the female is sexually active and has a cervix), will be considered if the detainee has been in ICE Custody 1 year **AND** there is no indication of imminent removal.**

Mammography requests will be considered for routine screening for asymptomatic cases if the detainee has been in ICE Custody 1 year **AND** there is no indication of imminent removal.**

The following are examples of commonly requested procedures that are **not covered** but can be requested in the event of an emergency situation.

** Reference the Guide to Clinical Preventative Services, (latest version), Report of the U.S. Preventative Task Force

Amniocentesis, unless justified in writing by the attending physician because of clinical findings indicating possible complication

Elective abortions

Home uterine monitoring devices, unless justified in writing by a physician because of clinical findings indicating possible complications

Infertility workup or treatment, including Assisted Reproductive Technology (ART)

Intersex surgery, female to male or male to female

Ligation or transection of fallopian tubes

Non-emergency Hysterectomy

Procedures, services and supplies related to sex transformations

Reversal of surgically induced sterility

Uterine suspension

Voluntary sterilization or other family planning services, including contraceptive drugs, devices, or surgery

Orthopedics/ Rehabilitation

Orthopedic services may be covered for emergent care. Scheduled, non-emergent or work up procedures and testing are **not a covered benefit**.

Rehabilitation services or the admission to an acute rehabilitation facility are usually not covered.

All requests are reviewed on a case by case basis.

The following are commonly requested services which are **not covered**:

Maintenance or palliative physical, occupational, speech or cognitive therapy for a chronic disease or condition

Orthopedic devices (shoes, braces, etc.) unless the detainee possessed a pair at the time of his/her arrest, and they were lost or damaged beyond repair during his or her incarceration and based upon clinical findings.

Short-term or long-term rehabilitative therapy (physical, speech, occupational and cognitive)

Short-term rehabilitation services

Prosthetics are usually a non-covered item

Other Services

Follow up health care services, with periodic check ups, for detainees with conditions that are considered chronic will be determined by the onsite health care provider. These conditions may include, but not be limited to:

- Asthma
- Hypertension

- Diabetes
- Mental Health
- HIV/AIDS
- Seizure Disorder
- TB/INH

HIV testing **will be approved** if a provider determines that the HIV testing is indicated based on clinical evaluation or if the detainee requested the test **and** it is deemed necessary by the medical provider.

Screening for disease processes will be considered for approval on a case by case basis, clinical findings and referencing the Guide to Clinical Preventative Services, (latest version), Report of the U.S. Preventative Services Task Force. Detainees must be in ICE/BP custody at least 12 months with no indication of imminent removal. Examples are:

- Breast Cancer
- Uterine/Cervical Cancer
- Prostatic Cancer
- Colon/rectal Cancer

The following medical interventions and procedures are **not a covered benefit**.

Acupuncture

Air purifiers, air conditioners, heating pads, whirl-pool bathing equipment, sun and heat lamps, and

exercise devices, even if ordered by a physician, unless preauthorized.

Apnea monitor

Assembly and operation of pump with oxygenator or heat exchanger

Bereavement counseling

Biofeedback training

Care or treatment not provided in accordance with accepted professional medical standards in the United States

Chiropractic services

Clinical ecology and environmental medicine

Communication equipment including computer "story boards" or "light talkers"

Extracorporeal Membrane Oxygenation (ECMO)

Fabrication of athletic mouth guards

Financial or legal counseling

Genetic testing

Hospitalization that is not deemed medically necessary

Naturopathy

Outpatient consultations by medical specialists, unless ordered by a primary care physician and preauthorized.

Pastoral counseling

Personal comfort items during hospitalization such as radio, television, telephone, guest beds, admission kits, or other comfort items

Podiatric services, including foot orthotics and the removal of corns or calluses or trimming of nails

Private-duty nursing

Procedures, services, and supplies for weight control

Services and supplies not reasonably necessary for the diagnosis and treatment of an illness or injury

Services and supplies for cosmetic purposes

Wigs

Pharmacy

Pharmacy requests for medications on the DIHS Formulary do not require prior authorization. (www.inshealth.org/documents/Formulary/DIHS_Formulary.pdf)

All non-formulary medications require prior authorization.

Prescription drugs are approved up to a 30 day supply.

Drug approvals for a detainees being released from ICE/BP custody:

Up to a 5 day supply of medication

There is **no benefit** for over the counter medications.

Prosthetics

Prosthetic services are usually not a covered benefit. Requests will be reviewed on a case by case basis.

Prosthetic devices are **not replaced** if they were left behind or lost at a previous detention facility. This is considered a property issue and needs to be coordinated between the two facilities.

Psychology/Psychiatry

Scheduled, non-emergency services are not a covered benefit. Requests will be reviewed on a case by case basis.

Detainees who are exhibiting active signs/symptoms of suicidal ideation may require acute hospitalization. Follow up care may be requested and reviewed on a case by case basis.

The following are examples of commonly requested procedures that are **not covered** but can be requested in the event of an emergency.

Counseling or therapy for marital, educational, behavioral, or sexual diagnosis or treatment of sexual dysfunction/inadequacy/impotence

Hypnotherapy problems

Psychoanalysis or psychotherapy credited toward earning a degree, or furtherance of education or training, regardless of diagnosis or symptoms that may be present

Psychological or psychiatric testing, counseling or psychotherapy unless approved by the Medical Director

Sleep therapy or evaluation

Treatment of alcoholism or substance abuse (rehabilitation)*

Treatment for learning disabilities and mental retardation

Radiology

Scheduled, non-emergent diagnostic x-ray services are usually **not a covered benefit**. Requests will be reviewed on a case by case basis.

Single view chest x-rays **are covered** to rule out tuberculosis in the presence of a positive PPD.

*** Exception**

Detainees exhibiting acute signs/symptoms of substance abuse or alcohol withdrawal may be approved for a hospital admission to manage these acute symptoms.

DIHS supports the most current Centers for Disease Control (CDC) Guidelines for the identification and treatment of tuberculosis.

Urinary System

Scheduled, non-emergent services are not a covered benefit. Requests will be reviewed on a case by case basis.

The following is a commonly requested procedure which is **not covered**, but can be requested in the event of an emergency situation.

Revision ileostomy

Vision

Scheduled, non-emergent or work up vision procedures and/or testing is not covered. Requests are reviewed on a case by case basis.

Eyeglasses are **not a covered benefit**, except in cases in which the detainee was taken into custody **with** eyeglasses **and** they are broken while he or she is in custody. Then, only one replacement pair is authorized. No designer frames are authorized. The least expensive pair of clear prescription glasses is authorized. The facility must obtain the eyeglasses, if approved, through Institutional Eye Care. There is no benefit for reading glasses.

Eyeglasses are **not replaced** if they were left behind or lost at a previous detention facility. This is considered a property issue and needs to be coordinated between the 2 facilities.

Eye examinations to assess ocular health by an Ophthalmologist will be approved for the following situations:

- Rule out glaucoma
- **Acute** vision loss
- Suspected retinal disease in detainees with a history of diabetes, hypertension, immunocompromise, etc
- Long term treatment with medications that may cause visual disturbances

The following are commonly requested services which are **not covered** except in an emergent situation.

Cataract removal

Cataract surgery

Contact lenses; replacements or supplies

Eye glass supplies

Eye prosthesis or the maintenance of

Modification of ocular implant

Strabismus surgery

Visual training exercises

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FRANCISCO CASTANEDA, Plaintiff, v. UNITED STATES OF AMERICA et al. Defendants.	)	No. CV 07-07241 DDP (JCx)

ORDER TO ACCEPT FEDERAL DEFENDANTS' PRIOR RESPONSES TO THE COMPLAINT AS THEIR RESPONSES TO PLAINTIFF'S FIRST AMENDED COMPLAINT

(Filed Feb. 13, 2008)

The Court accepts the parties' Stipulation to Accept Federal Defendants' Prior Responses to the Complaint as Their Responses to Plaintiff's First Amended Complaint ("FAC") and orders that both the United States' answer and the individual federal defendants' (Timothy Shack, Esther Hui, Stephen Gonsalves, Chris Henneford and Gene Migliaccio) motion to dismiss be deemed their responses to the FAC.

Dated: February 13, 2008

/s/ Dean D. Pregerson
HON. DEAN D. PREGERSON
District Court Judge

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**UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA**

YANIRA CASTANEDA, as personal, representative of the ESTATE OF FRANCISCO CASTANEDA; VANESSA CASTANEDA, as heir and beneficiary of the Estate, by and through her mother and guardian, LUCIA PELAYO Plaintiff, vs. THE UNITED STATES OF AMERICA,	Case No.: CV07-07241 DDP (JCx) **SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** (Filed Mar. 20, 2008) **First Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION)** – FTCA Claim against UNITED STATES for Medical Negligence (Non-Jury Claim)

GEORGE MOLINAR, in his individual capacity, CHRIS HENNEFORD, in his individual capacity, GENE MIGLIACCIO, in his individual capacity, TIMOTHY SHACK, M.D., in his individual capacity, ESTHER HUI, M.D., in her individual capacity, STEPHEN GONSALVES, in his individual capacity, CLAUDIA MAZUR, in her individual capacity, DANIEL HUNTING, M.D., S. PASHA, in his/her individual capacity, M. SHERIDAN, in his/her individual capacity, and A. LEONG, in his/her individual capacity and DOES 1-10,

Defendants.

Second Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – FTCA Claim against UNITED STATES for Negligent Establishment of Policy for Provision of Medical Care to Immigration Detainees (Non-Jury Claim)

Third Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – FTCA Claim against the UNITED STATES for Negligent Application of Policy for Provision of Medical Care to Immigration Detainees (Non-Jury Claim)

Fourth Cause of Action (SURVIVAL ACTION) – FTCA Claim against UNITED STATES for Intentional Infliction of Emotional Distress (Non-Jury Claim)

Fifth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – Bivens Claim for Inadequate Medical

) Care against all Individ-
) ually Named Defendants
) (except Hunting) and
) DOES 1-10
)
) **Sixth Cause of Action**
) **(WRONGFUL DEATH**
) **AND SURVIVAL**
) **ACTION)** – Bivens
) Claim for Equal Protec-
) tion Violation against all
) Individually Named
) Defendants (except
) Hunting) and DOES 1-10
)
) **Seventh Cause of**
) **Action (WRONGFUL**
) **DEATH AND SURVIV-**
) **AL ACTION)** – Section
) 1983 Claim against S.
) PASHA, M. SHERIDAN,
) and A. LEONG and
) DOES 1-10
)
) **Eighth Cause of Action**
) **(WRONGFUL DEATH**
) **AND SURVIVAL**
) **ACTION)** – Medical
) Negligence Claim DOES
) 1-10
)
) **Ninth Cause of Action**
) **(WRONGFUL DEATH**
) **AND SURVIVAL**
) **ACTION)** – Medical
) Negligence Claim
) against HUNTING and
) DOES 1-10

Plaintiffs, YANIRA CASTANEDA, as personal representative of the ESTATE OF FRANCISCO CASTANEDA; VANESSA CASTANEDA, as heir and beneficiary of the Estate, by and through her mother and guardian, LUCIA PELAYO ("PLAINTIFFS"), by and through their undersigned counsel, hereby files the Second Amended Complaint and Demand for Jury Trial and states as follows:

PRELIMINARY STATEMENT

1. FRANCISCO CASTANEDA, ("CASTANEDA") a former immigration detainee, received such grossly inadequate medical care for a penile lesion while in California State and federal custody that he developed fatal penile cancer, had his penis amputated, and died from cancer on February 16, 2008. This lawsuit charges the federal and California governments, and/or their agents, with constitutional violations, medical negligence and other torts, based on their egregious medical neglect of CASTANEDA.

2. The Defendants' refusal to provide CASTANEDA reasonable and humane medical care while he was in custody was tantamount to torture. He was forced to endure one of the most painful, terrifying, and humiliating experiences imaginable. CASTANEDA continually pleaded for the biopsy recommended by California medical providers, federal medical providers, and outside specialists selected by the federal government, but was denied this simple and inexpensive diagnostic test. As a result, he was denied medical

treatment that would have prevented his penile cancer from spreading and becoming terminal.

3. CASTANEDA was held in custody by the California Department of Corrections from December 6, 2005 to March 26, 2006. During this time, he was examined by California medical providers who documented a 2 cm. by 2 cm. lesion on his penis and issued multiple orders for a urologic consult and biopsy. Yet, CASTANEDA was denied access to a urologist and was never given a biopsy.

4. CASTANEDA was detained in Immigration and Customs Enforcement ("ICE") custody from March 27, 2006 to February 5, 2007. During his over ten months in ICE custody, federal medical providers and outside medical specialists selected by the federal government documented that the lesion on CASTANEDA's penis might be cancerous, recommended a biopsy, and recognized that the need for diagnosis and treatment was urgent. Yet, the federal government denied CASTANEDA the medical diagnosis and treatment both recommended and needed. All the while, CASTANEDA's condition grew worse. He experienced extreme pain, swelling, tumor growth, bleeding, drainage and a discharge, a foul odor, and the inability to urinate standing up.

5. Finally, after prolonged pressure from the ACLU National Prison Project, the federal government scheduled CASTANEDA for a biopsy to occur in February 2007, but released CASTANEDA from custody just a few days before the scheduled biopsy,

presumably so it would not have to pay for the procedure or any subsequent medical treatment he would need. Ultimately, the federal government *never* provided CASTANEDA with any treatment for his obvious penile disease during his entire ten-month detention.

6. Shortly after his release from ICE custody, CASTANEDA went to the emergency room at Harbor-UCLA Hospital in Los Angeles on February 8, 2007. After performing a biopsy, Harbor-UCLA doctors diagnosed him with invasive squamous cell carcinoma of the penis and amputated his penis on Valentine's Day, February 14, 2007. By the time he received treatment at Harbor-UCLA, CASTANEDA's penile cancer had already metastasized (spread) to his lymph nodes. He endured painful and grueling medical treatment, including chemotherapy and surgery, during the past year, and incurred a crushing debt for his medical treatment.

JURISDICTION AND VENUE

7. Jurisdiction of the court is proper under 28 U.S.C. §§ 1331, 1343(3), and 1346.

8. Venue is proper in this district pursuant to 28 USC § 139(b)(2), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed. Venue is also proper pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial

district in which this case is filed and the plaintiff is a resident of the judicial district.

9. This is an action for medical negligence and civil rights violations pursuant to applicable California statutes, 42 USCA § 1983, 28 U.S.C. § 2674 (the Federal Tort Claims Act), and *Bivens* claims for inadequate medical care and equal protection violations under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), the California Survival Statutes (CCP § 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

10. Compensatory damages are sought pursuant to applicable California statutes, 42 U.S.C. § 1983, the Federal Tort Claims Act, and the *Bivens* claims. Punitive damages are sought against all Defendants sued in their individual capacity pursuant to applicable California statutes, 42 USCA § 1983, and the *Bivens* claims. Attorneys' fees and costs are sought pursuant to 42 U.S.C. § 1988 for Plaintiffs claim under 42 USCA § 1983 and pursuant to applicable California law for Plaintiff's state law claims.

11. This Court has supplemental jurisdiction to consider state causes of action under 28 USCA §1367, as the ancillary state claims "form part of the same case or controversy" as other counts for which this Court has jurisdiction.

12. All governmental entities were notified of this claim in a timely fashion and all administrative

exhaustion and notice requirements under both the FTCA and state statutes have been satisfied.

PARTIES

13. FRANCISCO CASTANEDA was an adult male natural person, born on February 10, 1972, and was a resident of the State of California, County of Los Angeles. At all relevant times, he was detained and in the custody of either the United States as a "civil or pre-trial detainee," or the State of California as a convicted prisoner. He died in Los Angeles on February 16, 2008.

14. YANIRA CASTANEDA is an adult female natural person and a resident of the State of California, County of Los Angeles. She is the sister of CASTANEDA, and is the duly appointed, qualified and acting executor of decedent's estate, and personal representative of his Estate in this lawsuit. No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding. As personal representative of the estate, YANIRA CASTANEDA is bringing both Wrongful Death and Survival actions on behalf of the Estate, CASTANEDA, and his heir and beneficiary, VANESSA CASTANEDA, against the Defendants.

15. VANESSA CASTANEDA is a minor female natural person, born on [Date Of Birth Omitted], and is the sole heir and daughter of FRANCISCO CASTANEDA. She is a resident of Arizona.

16. LUCIA PELAYO is the natural mother of VANESSA CASTANEDA and is her guardian. She is a resident of Arizona.

17. THE UNITED STATES OF AMERICA ("UNITED STATES" or "the GOVERNMENT") is a governmental entity with jurisdiction and control over Immigration and Customs Enforcement ("ICE") and the Department of Immigration Health Services ("DIHS"). Plaintiff was detained in two ICE facilities during the relevant time period: San Diego Correctional Facility ("SDCF") in San Diego and San Pedro Service Processing Center ("San Pedro") in Los Angeles County.

18. S. PASHA, M. SHERIDAN, and A. LEONG were medical providers employed by the State of California in the Department of Corrections and Rehabilitation, who were acting under color of state law, while ostensibly providing medical services to the PLAINTIFF during his incarceration by the State of California.

19. GEORGE MOLINAR ("MOLINAR"), at all relevant times, was the ICE Officer-in-Charge at San Pedro and was directly responsible for the care and medical treatment received by detainees at that facility. He was also responsible for arranging specialized health care and hospitalization for detainees within the local community. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully

denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

20. CHRIS HENNEFORD ("HENNEFORD"), at all relevant times, was the Health Services Administrator of San Pedro. As the Health Services Administrator, HENNEFORD was responsible for the daily administration and functioning of the health care program and medical services, and provided supervision and direction to all health services staff at San Pedro. HENNEFORD was the direct avenue of communication between DIHS medical staff and ICE officials, including the Officer-in-Charge. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

21. GENE MIGLIACCIO ("MIGLIACCIO"), at all relevant times, was Director of DIHS. DIHS, a component of the U.S. Department of Health and Human Services (HHS), provides and oversees health care services to immigration detainees pursuant to an Interagency Agreement between ICE and HHS. DIHS provides primary on-site health care to detainees at both SDCF and San Pedro. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical

attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

22. TIMOTHY SHACK, M.D. ("SHACK"), at all relevant times, was Associate Director for Medical Services at DIHS. As such, SHACK was responsible for the administration and provision of health care services to individuals in ICE custody, and for developing and ensuring compliance with policies, procedures and clinical guidelines related to detainee health care. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

23. CLAUDIA MAZUR, R.N. ("MAZUR"), at all relevant times, was the Managed Care Coordinator for the Western Region of DIHS. MAZUR was responsible for responding to requests for authorization for detainee health care services, including off-site visits with specialists and subsequent surgery, from medical providers and ICE officials at facilities in the Western Region, which includes both SDCF and San Pedro. At all material times, she was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention,

diagnosis, and treatment, and she purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. She is being sued in her individual capacity.

24. ESTHER HUI, M.D. ("HUI"), at all relevant times, was a Medical Doctor at SDCF, and was the physician responsible for CASTANEDA's care and treatment while he was incarcerated at that facility from March 2006 until November 2006. At all material times, she was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and she purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. She is being sued in her individual capacity.

25. STEPHEN GONSALVES ("GONSALVES"), at all relevant times, was the Health Services Administrator at SDCF. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

26. DANIEL HUNTING, M.D. ("HUNTING"), at all relevant times, was a private physician licensed to practice medicine in the State of California and

was practicing medicine in San Diego, California. He rendered medical services to CASTANEDA on July 13, 2006 at Scripps Mercy Chula Vista Hospital. He is being sued in his individual capacity.

27. Defendants Does 1-5 are business entities of unknown form who were the employers of the individually named Defendants and/or Does 5-10. Defendants Does 1-10 are herein sued under fictitious names. Their true names and capacities are unknown to Plaintiff. Based on information and belief, Plaintiff alleges that Does 5-10 were the employees, officers, directors, managing agents, and/or supervisors of the UNITED STATES, CALIFORNIA, and/or Does 1-10 who were acting within the scope and course of their employment and authority at all times relevant to this Complaint.

FACTUAL ALLEGATIONS

28. CASTANEDA was detained in the California Department of Corrections and Rehabilitation ("DOC") after conviction by the State of California on December 6, 2005 and held until his early release date on March 26, 2006.

29. On December 8, 2005, CASTANEDA was seen by a DOC medical provider who ordered a "follow up with M.D." regarding a growth on Plaintiff's penis.

30. On December 27, 2005, a DOC medical provider, believed to be A. LEONG, entered an order

to refer CASTANEDA to a urologist. Despite this referral, CASTANEDA was never allowed to see a urologist during the course of his confinement. CASTANEDA'S confinement lasted for approximately another three months.

31. On January 13, 2006, CASTANEDA filled out a Health Services Request Form, complaining of back and kidney pain and requested medical attention from the DOC. It appears that the medical staff scheduled appointments on January 20 and/or 24th, but he was not brought to the medical center by prison guards as ordered.

32. On January 30, 2006, CASTANEDA filled out another Health Services Request Form, stating that his genital warts needed to be removed, he needed help, and he needed to see a doctor soon.

33. On February 7, 2006, CASTANEDA was examined in the "wart clinic" and the DOC medical provider, believed to be S. PASHA noted a 2 cm. x 2 cm. raised white and yellow lesion on his foreskin. The doctor's assessment was to rule out squamous cell cancer and Chlamydia. For the second time, a DOC doctor ordered an "urgent urology referral." Antibiotics were also prescribed.

34. By February 17, 2006, CASTANEDA had still not received his antibiotics and they were reordered. At that time, M. SHERIDAN was made aware of CASTANEDA's medical condition and need for urgent urologic care.

35. On February 27, 2006, CASTANEDA was again seen by a DOC provider, who documented that he was unable to retract CASTANEDA's prepuce (the uncircumcised skin on the head of his penis) and that his lesion was foul smelling. He also documented that CASTANEDA had been referred to a urologist for removal of the lesion.

36. On March 7, 2006, CASTANEDA was seen by a medical provider (S. PASHA) for the last time during his detention with DOC. A medical provider again documented that CASTANEDA had a "2cm x 2cm raised white irregular shaped lesion to his foreskin." However, nothing was done to diagnose or treat this problem and CASTANEDA was never provided the urgent urologic consult ordered in December 2005 and again in February 2006.

37. CASTANEDA was transferred to federal custody (San Diego Correctional Facility) on March 27, 2006. He immediately brought his medical condition to the attention of the SDCF staff upon admission, specifically informing them of a lesion on his penis that was becoming painful, growing in size, bleeding, and exuding discharge.

38. On March 28, 2006, CASTANEDA was examined by Lieutenant Anthony Walker ("Walker"), a Physician's Assistant, as part of the medical intake screening process at SDCF. Walker noted Castaneda's history of genital warts and his plan called for a urology consult "ASAP" with a request for biopsy.

39. CASTANEDA was next seen by a medical provider on April 11, 2006, when Walker again assessed CASTANEDA as having a penile lesion that required ruling out cancer. Walker also documented that CASTANEDA'S mother died of pancreatic cancer at age thirty-nine.

40. CASTANEDA was not seen again by a medical provider until April 28, 2006, when he informed Walker that the lesion on his penis smelled worse and was now draining pus. Walker noted that the lesion was more macerated at the glans (penis head) and emitted a foul odor.

41. Medical personnel filed a Treatment Authorization Request form ("TAR") in April 2006 with DIHS, requesting approval to have the lesion removed for purposes of a biopsy and to have CASTANEDA's penis circumcised. The TAR noted that CASTANEDA'S penile lesion had grown and that his pain level was measured at 8 out of 10 during urination and erection. The TAR also observed that "[patient] ("pt") has been treated for possible infections to no avail. Lesion has foul odor." The form further concluded that a biopsy should be performed "due to family history and pt discomfort, sooner the better."

42. The TAR was not approved until May 31, 2006, approximately two months after Walker ordered the consult and biopsy.

43. On June 7, 2006, the GOVERNMENT sent CASTANEDA to an outside specialist of its choice – John R. Wilkinson, M.D., Hematology Oncology

Diplomat. CASTANEDA presented with a history of a fungating lesion on the left side of his foreskin. The lesion was growing and Dr. Wilkinson documented his agreement with the medical staff at SDCF "that this may represent either a penile cancer or a progressive viral based lesion." His medical record states: "Strongly agree[d] that it requires urgent urologic assessment of biopsy and definitive treatment. In this extremely delicate area and [sic] there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated . . . I spoke with the physicians at the correctional facility. I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost effective. They understand the need for urgent diagnosis and treatment."

44. Dr. Wilkinson also documented that there was "no evidence of regional lymphadenopathy, no sign of distant metastasis." This meant that there was no observable evidence that the cancer had metastasized at that point.

45. On June 7, 2006, HUI documented a conversation she had with Dr. Wilkinson regarding his examination of CASTANEDA. HUI specifically noted that CASTANEDA had a penile lesion that required a biopsy and that Dr. Wilkinson offered to admit CASTANEDA to the hospital. She then documented that the biopsy, a diagnostic procedure to rule out a life threatening disease, was an "elective outpatient procedure" and therefore refused to admit CASTANEDA

for treatment at that time. She also never made arrangements for an outpatient biopsy, even though Dr. Wilkinson's note documented that HUI wished "to pursue outpatient biopsy which would be more cost effective."

46. On June 12, 2006, CASTANEDA filed a grievance asking for the surgery recommended by Dr. Wilkinson: "[Dr. Wilkinson] gave his professional opinion and recommended that I should be admitted and that surgery should be performed. At this time, Dr. Hui decided against the proposed surgery and denied the admittance. I am in a considerable amount of pain and I am in desperate need of medical attention."

47. On June 23, 2006, CASTANEDA informed Walker that his penis was getting worse: there was more swelling to the area, a foul odor, drainage, it was more difficult to urinate, and he was bleeding from the foreskin. Walker documented that there was "obvious slightly purulent drainage from foreskin of penis next to lesion on penis." Nevertheless, the GOVERNMENT did nothing to treat the problem.

48. Also on June 23, 2006, Dr. Wilkinson's office received a telephone call from SDCF reporting that CASTANEDA'S "foreskin lesion is increased in size and pressing further on his penis causing increasing discomfort." Dr. Wilkinson noted that CASTANEDA was to see Dr. Robert Masters, M.D., a urologist, and sent a copy of CASTANEDA's medical records to Dr. Masters.

49. On June 30, 2006, Walker authored a late entry progress note, stating that CASTANEDA "DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory." Walker told CASTANEDA that he did not have cancer although Walker documented that he was not sure "what the lesion would present, if and when, the biopsy was completed." The medical record documented that "this is something that can be managed also upon his release as well if that is the concern here," that there is "a three-year history with the past few months of the lesion looking and acting a bit more angry," and that there is "a severe deformed uncircumcised foreskin growth that could use attention but this lesion is an impediment at this time according to Dr. Masters." Walker counseled CASTANEDA to be patient and wait.

50. On July 12, 2006, Walker responded to CASTANEDA'S grievance, stating: "Not resolved. Patient wants further evaluation, assessment and treatment. Patient will be reassessed and further outside resources readdressed. Patient (sic) explained that he was never denied any treatment but pre authorization must be gained prior to any treatment."

51. On July 12, 2006, Walker again examined CASTANEDA and noted that the "lesion on his penis was draining clear, foul malodorous smell, cultures before were negative for growth, negative RPR, negative HIV, foreskin bleeding at this time, and patient states his colon feels swollen, previous rectal exam

showed slightly swollen prostate, deferred today." The assessment at that time was still "unknown etiology of penile lesion."

52. On July 12, 2006, Walker also authored another late entry progress note. The note stated that CASTANEDA "was not denied any treatment by Dr. Hui, although there was no active Treatment Authorization Request (TAR) placed for approval by DIHS headquarters in Washington, DC, nor was there an emergent need."

53. A TAR form was submitted on July 13, 2006, seeking emergency room evaluation and treatment for CASTANEDA, despite the fact that Walker documented that there was no emergent need to treat CASTANEDA the day before. There is no documentation explaining why the GOVERNMENT did not schedule him for the circumcision and biopsy that was ordered by Dr. Wilkinson the previous month and Walker approximately three months prior.

54. However, the TAR form documented that ICE officials spoke with Dr. Wilkinson and Dr. Masters, who: "both strongly recommended admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant, with return follow-up with oncology depending upon findings, and potential treatment or surgery of any malignant findings."

55. The TAR form also documented that CASTANEDA'S penis was bleeding, had drainage, malodorous smell and the "lesion now appears to be

'exploding' for lack of better words, definitely macerated." The request for inpatient urology and oncology evaluation and treatment was approved.

56. The GOVERNMENT failed to arrange for this evaluation with the treating doctors that were familiar with CASTANEDA'S condition, Dr. Wilkinson and/or Dr. Masters. Instead, ICE brought CASTANEDA to the emergency room at Scripps Mercy Chula Vista on July 13, 2006. This ultimately delayed CASTANEDA'S treatment further. CASTANEDA was examined at the Scripps emergency room by Juan Tovar, M.D., who noted a 1.5 cm. by 2 cm. fungating lesion on his penis with discharge but no lymphadenopathy, and made arrangements for admission to the hospital. His impression was: "penile mass, rule out cancer, versus infectious etiology."

57. HUNTING, a Scripps urologist, performed a very brief examination of CASTANEDA on July 13, 2006. He did not obtain CASTANEDA'S prior family history of cancer and believed CASTANEDA'S lesion was "probably condyloma." (genital warts). HUNTING referred him back to his "primary treating urologist" (Dr. Masters), rather than admit him to the hospital on an emergent basis. As a result, a circumcision and biopsy were not performed at Scripps to rule out cancer.

58. On July 17, 2006, Walker again examined CASTANEDA, noting that the penile lesion had grown and he had severe phimosis, bleeding, drainage and foul odor. Walker documented that he spoke to Dr.

Wilkinson and Dr. Masters, who both strongly recommended a circumcision and biopsy. He also documented that he spoke to a charge nurse at Scripps who stated that the urologist diagnosed condyloma acuminate (genital warts), "no need for biopsy but will need a resection of the penis due to severe phimosis and gross condyloma."

59. Walker submitted CASTANEDA for early release on July 18, 2006 to further CASTANEDA'S opportunities for testing and potential treatment, due to the Scripps emergency room's failure to perform testing. The GOVERNMENT apparently denied this request and CASTANEDA was not released at that time.

60. On July 26, 2006, David Lusche ("Lusche"), a physician's assistant at SDCF, documented that he explained to CASTANEDA "that while a surgical procedure might be recommended long-term, that does not imply that the federal Government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight" He also noted that his interaction with CASTANEDA "was conversational and calm, not confrontational."

61. On July 28, 2006, CASTANEDA filed a grievance against Lusche. That grievance was also denied. Lusche completed the Grievance Officer's Report and wrote: "I have met with Mr. Castaneda and explained that the urologist informed us that surgery at this point is elective in nature. As such the federal Government will not approve this (elective)

surgery. We will continue to monitor Mr. Castaneda's status at his request using the sick call system."

62. On August 9, 2006, CASTANEDA was again examined by Lusche. Lusche noted that CASTANEDA's foreskin was inflamed and that there was a whitish growth approximately 8 mm. in diameter noted at the inferior margin of the foreskin. Lusche again denied CASTANEDA'S request for surgery as elective. He documented that CASTANEDA "expressed understanding, but calmly stated he does not agree with the decision."

63. On August 10, 2006, CASTANEDA again requested a biopsy via sick call slip. On August 11, 2006, Walker submitted a TAR form requesting "biopsy lesion on penis, surgical correction of glans penis, circumcision, by Dr. Robert Masters.

64. On August 22, 2006, almost five months after Walkers recommendation for a urology consult, CASTANEDA was taken to see Dr. Robert Masters, M.D. Dr. Masters observed the lesion and concluded that CASTANEDA had genital warts and might have urethral condylomata (i.e., genital warts inside of his urethra). Dr. Masters determined that CASTANEDA was in need of a circumcision, which would relieve the "ongoing medical side effects of the lesion including infection and bleeding" and would provide a biopsy for further analysis.

65. Dr. Masters' report to Walker stated: "We will arrange for admission for circumcision at a local hospital. My principal hospital is Sharp Memorial."

66. The GOVERNMENT denied CASTANEDA treatment and he was never brought to the hospital for biopsy and circumcision pursuant to Dr. Masters' order. Walker documented his conversation with Dr. Masters on August 22, 2006. Walker characterized Dr. Masters as stating that the "elective procedures this patient may need in the future are cytoscopy and circumcision." Walker did not document Dr. Masters' conclusion that cancer needed to be ruled out via biopsy and his offer to admit CASTANEDA for treatment at Sharp Memorial Hospital. Despite Walker's continued use of the term "elective," that word does not appear anywhere in Dr. Masters' or Dr. Wilkinson's reports, the only specialist physicians who had documented performing a full examination of CASTANEDA.

67. On August 24, 2006, Walker told CASTANEDA that "according to policy," the GOVERNMENT would prevent him from having a circumcision with a cystoscopy because it was "elective." Again, Walker documented that release for medical reasons would be discussed with the medical team so that CASTANEDA could pursue treatment, surgery, and follow up. Nevertheless, the GOVERNMENT did nothing to treat the problem and did not permit CASTANEDA to seek treatment on his own.

68. On August 26, 2006, CASTANEDA was seen by medical staff because of "complaints of a stressful situation regarding his medical status, being unable to sleep at night as ICE won't allow surgical

operation for the lesion on penis." He was then prescribed Diphenhydramine, an antihistamine.

69. On August 28, 2006, CASTANEDA again requested treatment at sick call because he had stress and could not sleep. He attributed the stress to the chronic medical problems which the GOVERNMENT refused to correct. He was prescribed Trazodone, a psychoactive compound with sedative and anti-depressant properties, and a psychology consult, which he apparently never received. GOVERNMENT doctors were apparently indifferent to one of the well known side effects of Trazodone: priapism, a prolonged and painful erection in males.

70. On August 30, 2006, CASTANEDA received a memo from GONSALVES, the Health Services Administrator at SDCF. The memo informed CASTANEDA that: "the off site specialist you were referred to for your medical condition reports that any surgical intervention for the condition would be elective in nature. An independent review by our medical team is in agreement with the physician's assessment. The care you are currently receiving is necessary, appropriate and in accordance with our policies."

71. This conclusion is directly contradicted by Dr. Wilkinson and Dr. Masters' reports and by the GOVERNMENT'S TAR forms that specifically documented the off-site specialists' recommendations for surgical intervention and diagnostic biopsy.

72. On September 8, 2006, CASTANEDA was seen by Joanne Galano, RN, who received a sick call request stating, "I have a lot (sic) pain and I'm having discharge." She noted that 800 mg. of Ibuprofen was having no effect on his pain, he was having white discharge at night, and documented that "it's getting worse. It's like genital warts, but they're getting bigger."

73. On September 12, 2006, CASTANEDA stated again, via a sick call request, that he was having more penile lesion discharge and discomfort.

74. On September 14, 2006, Cindy Butler, RN, documented that CASTANEDA complained that: "My situation is getting worst and worst! I'm suffering pain, I cannot sleep because of the pain. Also the discharge does not stop nor the bleeding. It smells really bad! States that the antibiotic prescribed two days ago is not effective now, nor has it ever been in the past." The GOVERNMENT still did nothing to treat the problem.

75. On September 18, 2006, the GOVERNMENT denied CASTANEDA'S request to be prescribed amoxicillin.

76. On September 26, 2006, Walker examined CASTANEDA'S penis and noted "another condyloma type lesion is forming and foul odor emitting from uncircumcised area with mushroomed wart." Apparently, Walker discussed releasing CASTANEDA to obtain medical care, but was denied by ICE

because CASTANEDA was a "mandatory hold due to legal status."

77. On October 17, 2006, the medical staff was informed by the detention center's personnel that CASTANEDA was bleeding from his penis and had blood on his underwear.

78. On October 23, 2006, Walker submitted a TAR for surgery, which was pending. On October 25, 2006, the TAR request was denied because a DNS Staff Physician stated that "circumcisions are not a covered benefit."

79. The October 25 TAR form erroneously stated that "Patient has been seen by local urologist and oncologist and both are not impressed of possible cancerous lesions, however, there is an elective component to having the circumcision completed." This conclusion contradicted the July 13, 2006 TAR form, which documented that Dr. Wilkinson, the oncologist, and Dr. Masters, the urologist, both "strongly recommended . . . surgical intervention via biopsy/exploration" to rule out cancer via biopsy. This conclusion is also contradicted by the doctors' reports.

80. The October 25 TAR Form also documented that ICE authorities denied CASTANEDA'S request for release to seek medical care. It stated that CASTANEDA "is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite a while." This document shows that high-ranking GOVERNMENT authorities were aware CASTANEDA

needed treatment and knew he would be unable to receive it in the foreseeable future.

81. On or about October 29, 2006, Walker told CASTANEDA that multiple requests to Washington, D.C. seeking authorization for surgery had been denied.

82. On November 9, 2006, Cindy Butler, RN, documented that CASTANEDA'S "symptoms have worsened. States he feels a constant pinching pain, especially at night. States he constantly has blood and discharge on his shorts. . . . Also complains of a swollen rectum which he states make bowel movements hard." In response to these complaints, he was prescribed milk of magnesia and docusate sodium, a laxative. CASTANEDA was informed that the TAR was "in place for surgery and is pending approval", despite the fact that the TAR request was denied two weeks before.

83. On November 14, 2006, CASTANEDA was seen by Lusche, who documented that Castaneda complained of a new, second lesion on the underside of his penis and he requested assistance to obtain more fresh underwear.

84. On November 15, 2006, the medical records document that the penile lesion was growing and that CASTANEDA could not stand and urinate because the urine "sprays everywhere." Lusche's examination documented a genital wart that was white in color and moist in appearance, approximately 2.5 cm. in diameter, and noted light pink stains in CASTANEDA'S

underwear. Lusche treated this condition by making a request for seven pairs of clean boxer shorts weekly.

85. CASTANEDA was transferred from SDCF on November 17, 2006. The "Medical Summary of Federal Prisoner/Alien in Transit" sheet, signed by Cindy Butler, listed no "current medical problems" and listed Trazodone as the only prescribed medication, with no medication for pain or antibiotics.

86. On November 23, 2006, CASTANEDA was examined at the LA/Santa Ana Staging area and was noted to have "other penile anomalies."

87. CASTANEDA was booked into San Pedro on November 24, 2006. On information and belief, CASTANEDA'S medical records were transferred with him and were provided to medical personnel at San Pedro.

88. On or about December 1, 2006, CASTANEDA filed a sick call slip at San Pedro complaining of pain, bleeding and discharge from his penis.

89. On or about December 3, 2006, CASTANEDA filed two more sick call slips complaining about his continuing pain, bleeding and discharge. CASTANEDA also requested a clean set of blankets because he had soiled his original sheets with blood and discharge from his penis.

90. ACLU National Prison Project ("ACLU") attorneys became involved in CASTANEDA'S case on or about December 5, 2006. The ACLU sent a letter to multiple SDCF and Health Services Administration

("NSA") officials, recounting CASTANEDA'S medical history since entering ICE custody. The letter fully informed these officials of the situation, including that "Mr. Castaneda, who has a strong family history of cancer, legitimately fears that his long term health is being jeopardized by the lack of appropriate medical care he continues to receive in ICE custody. In the short term, Mr. Castaneda continues to experience severe pain, bleeding, and discharge." Among other requests, the letter asked for confirmation that arrangements had been made to appropriately treat CASTANEDA.

91. It appears that a TAR form was filed sometime on or about December 5, 2006, seeking a second professional opinion and follow up due to the degree of phimosis and hypospadia, stating "he should have a biopsy of this lesion as well to ensure its status."

92. The TAR was approved on December 5, 2006 for "urology consult only. Please submit treatment plan and clinical assessment if other care recommended." The TAR request sought a consultation with Lawrence Greenberg, M.D., because of a "history of severe HPV infection causing large, painful, penile warts, has bleeding and pain from the lesions. May also have an underlying structural deformity of penis."

93. As a result of the ACLU's advocacy, CASTANEDA was transported to the office of Lawrence S. Greenberg, M.D. on December 14, 2006.

Dr. Greenberg reviewed CASTANEDA'S medical records, which were provided to him by an ICE officer, and then physically examined CASTANEDA's penis. Dr. Greenberg noted the blood and discharge and asked why CASTANEDA had not had surgery.

94. Dr. Greenberg informed CASTANEDA that he required a circumcision and remarked that CASTANEDA'S penis was a "mess." At the end of the visit, Dr. Greenberg stated that CASTANEDA required surgery and that he would send a fax recommendation to the doctor at San Pedro later that day.

95. When CASTANEDA left Dr. Greenberg's office he was transported back to San Pedro and was told that he would be seen by the medical staff either on December 15 or December 18.

96. CASTANEDA was not seen by the medical staff on either December 15 or 18, despite filing a sick call slip on December 18 that reported a lump that had developed in his groin over the weekend.

97. On December 19, an ACLU attorney telephoned various officials regarding CASTANEDA'S medical care. The December 5 letter was again emailed to the Officer in Charge at that time. The Officer in Charge replied to the email, stating: "I am in receipt of your request. I am currently dealing with a couple serious issues this date. I will however, consult with the affected departments tomorrow and see what can be done concerning your request."

98. On December 26, 2006, Shelly Hollandsworth, RN, documented CASTANEDA'S complaint of blood coming from his penis. Although ICE had received Dr. Greenberg's report by December 15, Nurse Hollandsworth had no knowledge of the report. CASTANEDA was provided no treatment, despite Dr. Greenberg's report, the email from the ACLU and CASTANEDA'S disturbing medical presentation, which included a lump in his groin.

99. On January 11, 2007, CASTANEDA was again seen by Nurse Hollandsworth who still reported a "knowledge deficit related to follow up." Danielle Didonna also authored a note on January 11, stating that CASTANEDA had been seen by Dr. Greenberg who recommends advanced urology specialty care. Patient must have a biopsy and further treatment recommendations made." She also documented that CASTANEDA was in severe pain that was not being alleviated by pain medication. She documented that CASTANEDA was to have another specialty evaluation with biopsy. The assessment was to rule out carcinoma of penis secondary to HPV infection.

100. On January 19, 2007, the ACLU faxed another letter and request for medical treatment on CASTANEDA'S behalf to MOLINAR, Norma Bouales-Garibei, HENNEFORD, and MAZUR, higher level GOVERNMENT officials.

101. On January 24, 2007, forty days after Dr. Greenberg's surgical consult order, the records reflect

that a TAR form requesting a specialty urology consult with Asghar Askari, M.D. was verbally approved by Dr. Collins, presumably an ICE doctor.

102. On January 25, 2007, CASTANEDA was seen by Dr. Askari, who diagnosed a fungating penile lesion with possible left lymphadenopathy that was "most likely penile cancer." He ordered a penile biopsy on an out-patient basis under general anesthesia. He communicated these findings to the GOVERNMENT.

103. On January 29, 2007, the ACLU again wrote to ICE officials, urging them to provide CASTANEDA the care that had been ordered for him for the past ten months. A biopsy was finally scheduled for CASTANEDA in February.

104. Instead of providing the treatment ordered by Dr. Askari, ICE released CASTANEDA from custody on February 5, 2007. Presumably, ICE released CASTANEDA to avoid having to pay for the biopsy that was originally recommended by Walker on CASTANEDA'S first day of admission in March 2006, by Dr. Wilkinson on June 7, 2006, by Dr. Masters on August 22, 2006, and by Dr. Greenberg on December 14, 2006. The GOVERNMENT ultimately released CASTANEDA without ever providing the simple and inexpensive procedure essential to diagnosing a serious and life-threatening medical problem.

105. After his release from ICE custody, CASTANEDA went to the emergency room of Harbor-UCLA Hospital in Los Angeles ("Harbor-UCLA") on February 8, 2007. He was scheduled for a biopsy in

the Urology Clinic on February 12, 2007, and was admitted on February 13 with a diagnosis of squamous cell carcinoma of the penis.

106. His penis was amputated on February 14, 2007, Valentine's Day.

107. The partial penectomy left CASTANEDA with a 2 cm. stump. The remaining 8 cm. sample of his penis was sent to pathology, which revealed that CASTANEDA had "Invasive Squamous Cell Carcinoma (5.5 cm in size), keratinizing type." The tumor extended 4.5 cm. in depth.

108. Harbor-UCLA diagnosed CASTANEDA with metastatic penile cancer that spread throughout his body.

109. CASTANEDA underwent chemotherapy for the past year at Harbor UCLA and was diagnosed with terminal cancer. He died of cancer on February 16, 2008.

110. The UNITED STATES and its agents/ employees provided care based on a DIHS Detainee Covered Services Package providing that "benefits are provided for emergency care and not elective or non-emergent or pre-existing conditions. The definition of an emergency is 'a condition that poses an imminent threat to life, limb, hearing, or sight.'"

111. The DIHS policy differs from the medical policies that govern convicted criminals in the custody of the United States Department of Justice, Federal Bureau of Prisons. Convicted criminals are

not faced with the presumption that their "pre-existing" or "non-emergent" medical needs will not be treated.

FIRST CAUSE OF ACTION

Federal Tort Claims Act Claim against THE UNITED STATES OF AMERICA for Medical Negligence (WRONGFUL DEATH AND SURVIVAL ACTION) (Non Jury Claim)

112. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

113. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), the California Survival Statutes (CCP § 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

114. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

115. At all material times, the UNITED STATES carelessly and negligently cared for and

treated Plaintiff while he was detained at SDCF and San Pedro, and provided medical care in a careless and negligent manner and also acted with deliberate indifference to Plaintiff's known serious medical condition. The UNITED STATES carelessly and negligently treated, managed, monitored and supervised Plaintiff's condition during his detention from March 27, 2006 until February 5, 2007. The UNITED STATES' negligent care and negligent failure to administer appropriate care directly and proximately resulted in certain injury and disability to Plaintiff, all to his general damage.

116. As a direct and proximate result of the UNITED STATES' negligence. Plaintiff suffered certain injuries, including the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

117. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

SECOND CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Establishment of Unconstitutional Policy for Provision of Medical Care to Immigration Detainees (WRONGFUL DEATH AND SURVIVAL ACTION) (Non-Jury Claim)

118. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

119. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), the California Survival Statutes (CCP § 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

120. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

121. At all material times, the UNITED STATES failed to use reasonable care in the establishment of policies and directives for the provision of medical care to immigration detainees. The policies and directives for the provision of medical care were

unreasonable and inadequate in part because these policies violated clearly established constitutional law.

122. As a direct and proximate result of the UNITED STATES' negligence in creating and establishing these inadequate policies and directives, Plaintiff suffered certain injuries, including the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

123. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

THIRD CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Application of Policy for Provision of Medical Care to Immigration Detainees (WRONGFUL DEATH AND SURVIVAL ACTION) (Non-Jury Claim)

124. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

125. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and

San Pedro violate the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), the California Survival Statutes (CCP § 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

126. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

127. At all material times, the UNITED STATES carelessly and negligently implemented and/or applied the ICE detainee medical care policy such that the Plaintiff's request for a diagnostic biopsy, a simple and inexpensive procedure to rule out a life threatening disease, was denied as elective. In addition to qualifying as negligence, the UNITED STATES' action violated the Plaintiff's constitutional right to adequate and reasonable medical care.

128. As a direct and proximate result of the UNITED STATES' negligence, Plaintiff suffered certain injuries, including the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

129. As a further direct and proximate result of the negligent, acts, omissions and conduct of the

UNITED STATES and its agents, and the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

FOURTH CAUSE OF ACTION
FTCA Claim against UNITED STATES for Intentional Infliction of Emotional Distress (SURVIVAL ACTION) (Non-Jury Claim)

130. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

131. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674. This action is brought under the California Survival Statutes (CCP § 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

132. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

133. At all material times, the UNITED STATES' treatment of CASTANEDA during his detention,

including but not limited to the failure to provide him reasonable and humane medical care, was conducted in an extreme and outrageous manner with the knowledge that Plaintiff was unable to care for himself during his incarceration.

134. The UNITED STATES acted intentionally or with the reckless disregard of causing emotional distress.

135. As a direct and proximate result of the unlawful conduct of the UNITED STATES and its agents, Plaintiff has suffered special damages, including but not limited to past and future loss of income, benefits, medical expenses, and other damages to be proven at the time of trial.

136. As a direct and proximate result of the unlawful conduct of the UNITED STATES and its agents, Plaintiff has suffered general damages, including but not limited to shock, embarrassment, physical distress and injury, humiliation, severe emotional distress, stress and other damages to be proven at the time of trial.

137. Plaintiff is informed and believes, and thereon alleges, that the UNITED STATES and its agents committed the acts herein alleged maliciously, fraudulently and oppressively in conscious disregard for Plaintiff's rights and that the conduct of UNITED STATES and its agents was a substantial factor in causing Plaintiff's emotional distress.

FIFTH CAUSE OF ACTION
***Bivens* Claim for Inadequate Medical Care against all Individual Defendants (except HUNTING) (WRONGFUL DEATH AND SURVIVAL ACTION) and DOES 1-10**

138. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

139. This is a claim against all Defendants who were agents of the UNITED STATES and named in their individual capacity, excluding HUNTING ("INDIVIDUAL DEFENDANTS"), and DOES 1-10. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), the California Survival Statutes (CCP § 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

140. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated Plaintiff's right to adequate medical care under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution by failing to treat Plaintiff's known serious medical condition.

141. At all material times, the INDIVIDUAL DEFENDANTS and DOES 1-10 were aware that CASTANEDA had a growth on his penis that required a biopsy to rule out penile cancer, a very serious and life-threatening disease.

142. The INDIVIDUAL DEFENDANTS and DOES 1-10 purposefully denied CASTANEDA essential

medical care for a known serious medical condition, despite knowledge that CASTANEDA's mother had died from cancer at age thirty-nine and that CASTANEDA was not going to be released from custody to treat the life-threatening condition in the foreseeable future.

143. The actions of The INDIVIDUAL DEFENDANTS and DOES 1-10 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering "medical care" to CASTANEDA were so far below the acceptable standard that the INDIVIDUAL DEFENDANTS and DOES 1-10 could not have been making a "medical" judgment in their decision to deny CASTANEDA a very basic and inexpensive diagnostic procedure to rule out a life-threatening disease.

144. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny CASTANEDA medical care was not based on a medical reason, but rather economic and/or other constitutionally impermissible reasons unrelated to the provision of medical services.

145. Each of the INDIVIDUAL DEFENDANTS and DOES 1-10 were acting under color of law by exercising power made possible because the Defendants were clothed with the authority of federal law.

146. The INDIVIDUAL DEFENDANTS and DOES 1-10 acted with deliberate indifference to the serious health needs protected by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, subjected Plaintiff to dangerous and debasing conditions of confinement, and violated basic fundamental rights to safe and humane confinement. The inhumane conditions of confinement caused Plaintiff medical injuries as alleged in this Complaint. The conduct constituted cruel and unusual punishment and a violation of due process.

147. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated clearly established law by failing to adequately treat and/or diagnose a known serious medical condition.

148. As a result of the Defendants' constitutional violations of Plaintiff's rights, Plaintiff sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement;

c. Death;

d. Economic losses consisting of past medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

149. The conduct of each of the INDIVIDUAL DEFENDANTS and DOES 1-10 constitutes a reckless or callous disregard of Plaintiff's constitutional right to adequate medical care, entitling Plaintiff to punitive damages.

SIXTH CAUSE OF ACTION
***Bivens* Claim for Equal Protection Violations against all INDIVIDUAL DEFENDANTS (except HUNTING) (WRONGFUL DEATH AND SURVIVAL ACTION) and DOES 1-10**

150. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

151. This is a claim against all Defendants who were agents of the UNITED STATES and named in their individual capacity, excluding HUNTING ("INDIVIDUAL DEFENDANTS"), and DOES 1-10. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), the California Survival Statutes (CCP § 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

152. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated Plaintiff's right to equal protection under the Fifth and Fourteenth Amendments of the United States Constitution by failing to treat Plaintiff's known serious medical condition due to his immigration status, without a rational basis to do so.

153. At all material times, the INDIVIDUAL DEFENDANTS and DOES 1-10 were aware that CASTANEDA had a growth on his penis that required a biopsy to rule out penile cancer, a very serious and life-threatening disease.

154. The INDIVIDUAL DEFENDANTS and DOES 1-10 purposefully denied CASTANEDA essential medical care for a known serious medical condition, despite knowledge that CASTANEDA's mother had died from cancer at age thirty-nine and that CASTANEDA was not going to be released from custody to treat the life-threatening condition in the foreseeable future.

155. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering "medical care" to CASTANEDA were so far below the acceptable standard that the INDIVIDUAL DEFENDANTS and DOES 1-10 could not have been making a "medical" judgment in their decision to deny CASTANEDA a very basic and inexpensive diagnostic procedure to rule out a life-threatening disease.

156. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny CASTANEDA medical care was not based on a medical reason, but rather economic and/or other constitutionally

impermissible reasons unrelated to the provision of medical services.

157. Each of the INDIVIDUAL DEFENDANTS and DOES 1-10 were acting under color of law by exercising power made possible because the Defendants were clothed with the authority of federal law.

158. The INDIVIDUAL DEFENDANTS and DOES 1-10 acted in violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments of the United States Constitution by discriminating against CASTANEDA based on his immigration status with no rational basis to do so. In that regard, the INDIVIDUAL DEFENDANTS and DOES 1-10 failed to approve a simple and inexpensive diagnostic procedure for CASTANEDA because he was an immigration detainee, while having a policy to provide this type of care to other federal prisoners who were not in the same class as CASTANEDA.

159. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated clearly established law by violating CASTANEDA's rights to equal protection under the United States Constitution.

160. As a result of the Defendants' constitutional violations of Plaintiff's rights, Plaintiff sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement;

c. Death;

d. Economic losses consisting of past medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

161. The conduct of each of the INDIVIDUAL DEFENDANTS and DOES 1-10 constitutes a reckless or callous disregard of Plaintiff's constitutional right to Equal Protection, entitling Plaintiff to punitive damages.

SEVENTH CAUSE OF ACTION
42 U.S.C. § 1983 Claim against S. PASHA, M. SHERIDAN, A. LEOUNG (WRONGFUL DEATH AND SURVIVAL ACTION) and DOES 1-10

162. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

163. This claim is brought under 42 U.S.C. § 1983. S. PASHA, A. LEONG, M. SHERIDAN, and DOES 1-10, employees and/or agents of CALIFORNIA, violated Plaintiff's right to adequate medical care under the Eighth and Fourteenth Amendments of the United States Constitution by failing to treat Plaintiff's known serious medical condition. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), the California

Survival Statutes (CCP § 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

164. Each of these Defendants was acting under color of law by exercising power made possible because the Defendants were clothed with the authority of state law.

165. Each of these Defendants acted with deliberate indifference to the serious health needs protected by the Eighth and Fourteenth Amendments to the United States Constitution. They had actual knowledge that CASTANEDA had a 2cm by 2cm growth on his penis that required a biopsy to rule out cancer. In spite of this documented knowledge, they denied him the biopsy required to rule out cancer. This conduct constituted cruel and unusual punishment and a violation of due process.

166. DOES 1-10 violated clearly established law by acting with deliberate indifference in failing to adequately treat and/or diagnose a known serious medical condition.

167. As a result of these Defendants' constitutional violations of Plaintiff's rights, Plaintiff sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement;

c. Death;

d. Economic losses consisting of past medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

168. The conduct of each of these Defendants constitutes a reckless or callous disregard of the Plaintiff's constitutional rights, entitling Plaintiff to punitive damages.

EIGHTH CAUSE OF ACTION
Medical Negligence (WRONGFUL DEATH AND SURVIVAL ACTION) against DOES 1-10

169. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

170. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), and the California Survival Statutes (CCP § 377.20, 377.21, 377.30).

171. Defendants DOES 1 through 10, inclusive, are sued under fictitious names because their true names, involvement, and capacities, whether individual, associate, corporate or governmental, are not now known to Plaintiff. Based on information and belief, Plaintiff alleges that each of these Defendants are negligent or responsible in some manner for the events alleged in this Complaint, either as manufacturers, suppliers, sellers, distributors, physicians,

surgeons, anesthetists, nurses, other medical practitioners, pharmacists, hospitals or hospital attendants, ambulance companies or attendants, or otherwise. Plaintiff is uncertain as to the manner or function of these Defendants, whether as manufacturers, suppliers, sellers, distributors, physicians, surgeons, anesthetists, nurses, other medical practitioners, pharmacists, hospitals or hospital attendants, ambulance companies or attendants, or otherwise, and Plaintiff will ask leave to amend this Complaint to specifically name these Defendants when such names, capacities, functions, occupations and businesses of these Defendants have been more fully ascertained.

172. Based on information and belief, Plaintiff alleges that, at all times herein mentioned, each of these Defendants were the agents, servants and employees of each of the other Defendants named in this Complaint, and at all material times were acting within the course and scope of their agency, service and employment.

173. At all times herein mentioned, Defendants DOES 1 through 5, inclusive, were and now are corporate and/or public entities duly organized and existing under the laws of the State of California, and were at all times engaged in owning, operating and maintaining hospitals and other medical facilities to treat detainees in the State of California.

174. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the Defendants pursuant to

California Code of Civil Procedure § 364 and Government Code § 910.

175. At all times and places mentioned herein, each of these Defendants carelessly and negligent cared for and treated Plaintiff for his above-described medical condition and his general medical condition, and each of these Defendants provided hospital, medical, emergency, anesthetic, nursing, laboratory, x-ray, and ambulance services, care, and attention in a careless and negligent manner. Each of these Defendants carelessly and negligently treated, managed, monitored and supervised Plaintiffs condition during his detention by the State of California during 2005 and 2006, which, among other things, directly and proximately resulted in certain injury and disability to Plaintiff, all to his general damage.

176. As a direct and proximate result of these Defendants' negligence and carelessness, Plaintiff suffered certain injuries, including the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

177. As a further direct and proximate result of the negligent acts, omissions and conduct of these Defendants and of the injuries caused to Plaintiff, Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

NINTH CAUSE OF ACTION
Medical Negligence (WRONGFUL DEATH AND SURVIVAL ACTION) against HUNTING and DOES 1-10

178. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

179. HUNTING was, at all material times, a medical doctor licensed by the State of California and practicing medicine in California.

180. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the Defendants pursuant to California Code of Civil Procedure § 364. This action is brought under the California Wrongful Death Statute (CCP § 377.60, 377.61, 377.62), the California Survival Statutes (CCP § 377.20, 377.21, 377.30).

181. ICE brought CASTANEDA to the emergency room at Scripps Mercy Chula Vista on July 13, 2006. CASTANEDA was examined at the Scripps emergency room by Juan Tovar, M.D., who noted a 1.5 cm. by 2 cm. fungating lesion on his penis with discharge but no lymphadenopathy, and made arrangements for admission to the hospital. His impression was: "penile mass, rule out cancer, versus infectious etiology."

182. HUNTING, a Scripps urologist, performed a very brief examination of CASTANEDA on July 13, 2006. He did not obtain CASTANEDA'S prior family

history of cancer and believed CASTANEDA'S lesion was "probably condyloma" (genital warts). HUNTING declined to treat him and made the erroneous assumption that CASTANEDA'S lesion was not cancerous without the benefit of a diagnostic biopsy. As a result of HUNTING'S intervention, a circumcision and biopsy were not performed at Scripps to rule out cancer.

183. At all times and places mentioned herein, each of these Defendants carelessly and negligently cared for and treated Plaintiff for his above-described medical condition and his general medical condition, and each of these Defendants provided hospital, medical, emergency, anesthetic, nursing, laboratory, x-ray, and ambulance services, care, and attention in a careless and negligent manner. Each of these Defendants carelessly and negligently treated, managed, monitored and supervised Plaintiff's condition in July 2006 which, among other things, directly and proximately resulted in certain injury and disability to Plaintiff, all to his general damage.

184. As a direct and proximate result of these Defendants' negligence and carelessness, Plaintiff suffered certain injuries, including the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

185. As a further direct and proximate result of the negligent acts, omissions and conduct of these Defendants and of the injuries caused to Plaintiff,

Plaintiff was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

JURY TRIAL DEMAND

Plaintiff demands a jury trial to resolve all claims brought herein except for the claim against THE UNITED STATES OF AMERICA under the FTCA, which must be adjudicated by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that, after due proceedings, judgment be entered in favor of Plaintiff and against all Defendants, jointly and severally, and that this Court:

(a) Award Plaintiff all compensatory damages reasonable under the circumstances, including physical pain and suffering, mental anguish and emotional distress, disfigurement, medical expenses, loss of enjoyment of life, and any other compensatory damages, for each count alleged in the Complaint;

(b) Award Plaintiff punitive damages against all Defendants sued in their individual capacity, except for HUNTING. (Plaintiff acknowledges that punitive damages are not available against the governmental entity defendants);

(c) Award all damages available to the Plaintiff under the California and Federal Survival

Rule as well as the California Wrongful Death Statute

(d) Award Plaintiff reasonable attorneys' fees, expert fees, and court costs under 42 U.S.C. §1988 for the prosecution of his 42 U.S.C. § 1983 claims;

(e) Award Plaintiff legal interest on all damages awarded from the date of judicial demand until paid; and

(f) Award Plaintiff such other and further relief as this Court deems just and proper.

Dated this 18th day of March, 2008

By: /s/ Conal Doyle
CONAL DOYLE

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

YANIRA CASTANEDA, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Case No. CV 07-07241 DDP (JCx) **DEFENDANT UNITED STATES OF AMERICA'S AMENDED ANSWER TO SECOND AMENDED COMPLAINT** (Filed Mar. 26, 2008) Honorable Dean D. Pregerson

COMES NOW Defendant UNITED STATES OF AMERICA ("United States") in the above-styled action by and through undersigned counsel, the United States Attorney for the Central District Court of California, file this Answer to the Second Amended Complaint as follows:

Answering those allegations contained of the numbered paragraphs of the Second Amended Complaint, the United States responds as follows:

1. In response to Paragraph 1, the United States admits that Castaneda was formerly detained in United States Customs and Enforcement ("ICE") custody and that he developed penile cancer, had his penis amputated and died on or about February 16, 2008. The United States denies the remaining allegations in Paragraph 1.

2. In response to Paragraph 2, this contains a jurisdictional or conclusory statement that does not require a response. To the extent a response is necessary, the United States denies these allegations.

3. In response to Paragraph 3, the United States lacks sufficient information to either admit or deny the allegations in this Paragraph and therefore denies these allegations.

4. In response to Paragraph 4, the United States admits that Castaneda was detained in ICE custody from about March 27, 2006 to about February 5, 2007 and that federal medical providers documented that the lesion on Castaneda's penis might be

cancerous, recommended a biopsy, and recognized the need for diagnosis and treatment. In response to the last sentence in Paragraph 4, the United States admits that records indicates that Castaneda stated he experienced pain; bleeding, draining and discharge, and a foul odor from his penis; swelling in his penis; and difficult in urinating. The United States denies the remaining allegations in Paragraph 4.

5. In response to Paragraph 5, the United States admits that medical employees scheduled a biopsy and that Castaneda was released from ICE custody prior to Castaneda receiving that biopsy. The United States denies the remaining allegations in Paragraph 5.

6. In response to Paragraph 6, the United States admits that records produced by Castaneda indicate that Castaneda's carcinoma of the penis was diagnosed at Harbor-UCLA Medical Center after Castaneda's release from ICE custody. The United States lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

7. In response to Paragraph 7, this contains a jurisdictional or conclusory statement that does not require a response. To the extent a response is necessary, the United States admits these allegations.

8. In response to Paragraph 8, this contains a jurisdictional or conclusory statement that does not require a response. To the extent a response is necessary, the United States admits these allegations

except lacks information regarding Plaintiff's residence.

9. In response to Paragraph 9, this contains a jurisdictional or conclusory statement that does not require a response. To the extent a response is necessary, the United States denies the remaining allegations in Paragraph 9.

10. In response to Paragraph 10, this contains a jurisdictional or conclusory statement that does not require a response. To the extent a response is necessary, the United States denies these allegations.

11. In response to Paragraph 11, this contains a jurisdictional or conclusory statement that does not require a response. To the extent a response is necessary, the United States denies these allegations.

12. In response to Paragraph 12, the United States admits that Castaneda filed a timely federal government tort claim with the United States. The remaining allegations contain jurisdictional or conclusory statements that do not require a response. To the extent a response is necessary, the United States denies these allegations.

13. In response to Paragraph 13, the United States admits that at all time, alleged in the Complaint as to the United States, Castaneda was detained in the custody of the federal government and has been informed by Castaneda' s counsel that Castaneda passed away on February 16, 2008. The United States lacks sufficient information to either

admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

14. In response to Paragraph 14, the United States lacks sufficient information to either admit or deny the allegations in this Paragraph and therefore denies these allegations.

15. In response to Paragraph 15, the United States lacks sufficient information to either admit or deny the allegations in this Paragraph and therefore denies these allegations.

16. In response to Paragraph 16, the United States lacks sufficient information to either admit or deny the allegations in this Paragraph and therefore denies these allegations.

17. The United States admits the allegations in Paragraph 17.

18. In response to Paragraph 18, the United States lacks sufficient information to either admit or deny the allegations in this Paragraph and therefore denies these allegations.

19. In response to Paragraph 19, the United States admits that George Molinar was employed by ICE at the times alleged against the United States. The United States also admits that George Molinar is being sued in his individual capacity. The United States denies the remaining allegations in Paragraph 19.

20. In response to Paragraph 20, the United States admits that Chris Henneford was employed by DIHS as the Health Services Administrator of the San Pedro Service Processing Center at the times alleged against the United States. The United States also admits that Chris Henneford is being sued in his individual capacity. The United States denies the remaining allegations in Paragraph 20.

21. In response to Paragraph 21, the United States admits that Gene Migliaccio was the Director of DIHS at the times alleged against the United States. The United States also admits the allegations in the second sentence of Paragraph 21. The United States further admits that Gene Migliaccio is being sued in his individual capacity. The United States denies the remaining allegations in Paragraph 21.

22. In response to Paragraph 22, the United States admits that Timothy Shack, M.D., was Director of Medical Services for DIHS at the times alleged against the United States. The United States further admits that Timothy Shack, M.D., is being sued in his individual capacity. The United States denies the remaining allegations in Paragraph 22.

23. In response to Paragraph 23, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

24. In response to Paragraph 24, the United States admits that Esther Hui, M.D., was a Medical Doctor at SDCF at the times alleged against the

United States. The United States further admits that Esther Hui, M.D., is being sued in her individual capacity. The United States denies the remaining allegations in Paragraph 24.

25. In response to Paragraph 25, the United States admits that Stephen Gonsalves was the Health Services Administrator at SDCF at the times alleged against the United States. The United States further admits that Stephen Gonsalves is being sued in his individual capacity. The United States denies the remaining allegations in Paragraph 25.

26. In response to Paragraph 26, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

27. In response to Paragraph 27, this contains a jurisdictional or conclusory statement that does not require a response. To the extent a response is necessary, the United States denies these allegations.

28. In response to Paragraph 28, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

29. In response to Paragraph 29, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

30. In response to Paragraph 30, the United States lacks sufficient information to either admit or

deny these allegations and therefore denies these allegations.

31. In response to Paragraph 31, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

32. In response to Paragraph 32, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

33. In response to Paragraph 33, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

34. In response to Paragraph 34, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

35. In response to Paragraph 35, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

36. In response to Paragraph 36, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

37. In response to Paragraph 37, the United States admits that the records indicate Castaneda

was booked in Federal Custody at the San Diego Correctional Facility on March 27, 2006. The United States lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

38. In response to Paragraph 38, the United States admits that a Chronological Record of Medical Care dated March 28, 2006 indicates that Castaneda was seen by Physician's Assistant Anthony Walker ("Physician's Assistant Walker") on March 28, 2006, that Physician's Assistant Walker noted that Castaneda had a history of genital warts, and noted that "urology consult asap [ ] request for biopsy."

39. In response to Paragraph 39, admits that a record dated April 11, 2006 indicates that Castaneda was seen by Physician's Assistant Walker on April 11, 2006, that Physician's Assistant Walker noted that Castaneda had "Penial lesion need r/o CA," and that "FMHx mother deceased PANCREATIC CA at age 39."

40. In response to Paragraph 40, the United States admits that a record dated April 28, 2006 indicates that Castaneda was seen by Physician's Assistant Walker on April 28, 2006, that Physician's Assistant Walker noted that the "Lesion on penis is more macerated at the glans and emits a foul odor," and that Castaneda "Also states lesion on penis is smelling worse and leaking some drainage."

41. In response to Paragraph 41, the United States admits that a Treatment Authorization &

Consultation Form (TAR #20060414169100) states "As previously stated, this pt is a 34 yo hisp. male with family history of CANCER. His mother died of pancreatic CA at age 39 and his father died of massive MI at age 27. He presents with large lesion to the glans penis with maceration at its core. It does not appear to have a massive infection at this time, however it does need assessing. Also, he has a severe phimosis that is causing him difficulty urinating, discomfort in general and he is not circumcised. This degree of phimosis and hypospadia needs a second professional opinion and follow-up. He should have a biopsy of this lesion as well to ensure its status. Please re-evaluate this request and if there are further questions, do not hesitate to contact me. Thank you." The United States further admits that a Treatment Authorization & Consultation Form (Authorization #200605316672 00) states "34yo hisp male with strong family hx various cancers. Pt with macerated lesion to glans penis, RPR negative, HIV negative, lesion is becoming worse. Urology unable to see this pt, however lesion removal and biopsy strongly recommended by a surgeon for lab study. Pt has been treated for possible infections to no avail. Lesion has foul odor. Also has severe hypospadias with 8/10 pain with urination and erection. Grossly uncircumsized [sic]. Strongly recommend lesion excision for biopsy, surgical correction of glans penis for severe hypospadias and circumcision, and pertinent surgical f/u. Due to family history and pt discomfort, sooner the better. Thank you."

42. In response to Paragraph 42, the United States admits that a record dated May 31, 2006 indicates that a Treatment Authorization Request ("TAR") was approved on May 31, 2006 for "lesion excision for biopsy, surgical correction of glans penis for severe hypospadias and circumcision, and pertinent surgical f/u." The United States denies the remaining allegations in this Paragraph.

43. In response to Paragraph 43, the United States admits that a record dated June 7, 2006 indicates that Castaneda was seen by private Dr. John Wilkinson on June 7, 2006. The United States also admits that private Dr. Wilkinson's record dated June 7, 2006 indicates that "I agree with the physicians at the metropolitan correctional Center that this may represent either a penile cancer or a progressive viral based lesion. I strongly agree that it requires urgent urological assessment of biopsy and definitive treatment. In this extremely delicate area and there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated. I would recommend that he return to see us only if he is found to have a neoplasm as the cause of his penile lesion. I've not found any correlation between penile cancers and vitiligo in a Medline search." The United States lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

44. In response to Paragraph 44, the United States admits that private Dr. Wilkinson's record

dated June 7, 2006 indicates that "no lymphadenopathy in anterior or posterior cervical chains, supraclavicular, axillary or inguinal regions." The United States lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

45. In response to Paragraph 45, the United States admits that a record dated June 7, 2006 indicates that Federal Defendant Dr. Esther Hui noted "[Private] Dr. Wilkinson called in regards to this patient who he saw in clinic today. This patient has a penile lesion that needs to be biopsied. He is not able to biopsy this lesion but offered to admit him to the hospital in order to assist in the coordination or care. Since this is an elective outpatient procedure, we decided that we would not admit him at this time." The United States denies the remaining allegations.

46. The United States admits the allegations in Paragraph 46.

47. In response to Paragraph 47, the United States admits that a record dated June 23, 2006 indicates that Castaneda saw Physician's Assistant Walker, and that Physician's Assistant Walker noted "Obvious slightly purulent drainage from foreskin of penis next to lesion on penis," and that "Pt states it is getting worse, more swelling to the area, foul odo[r], drainage, more difficult to urinate, bleeding from foreskin." The United States denies the allegations in the last sentence in Paragraph 47.

48. In response to Paragraph 48, the United States admits that a record from private Dr. Wilkinson dated June 23, 2006 notes that "phone call from correctional facility, patient's foreskin lesion is increased in size and pressing further on his penis causing increasing discomfort. Patient to see [private] Dr. Robert Masters, M.D. urology. Copy of records sent to [private] Dr. Masters." The United States lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

49. The United States admits the allegations in Paragraph 49.

50. The United States admits the allegations in Paragraph 50.

51. In response to Paragraph 51, the United States admits that a record dated July 12, 2006 indicates that Castaneda was seen by Physician's Assistant Walker on July 12, 2006 and that Physician's Assistant Walker noted that "lesion on penis is draining clear, foul malodorous smell, cultured before were negative for growth. negative RPR, negative HIV. foreskin is bleeding at this time and pt states his colon feels swollen, previous rectal exam showed slightly swollen prostate, deferred today" and an "unk etiology of penial lesion."

52. In response to Paragraph 52, the United States admits that another record dated July 12, 2006 indicates that Physician's Assistant Walker noted that "Pt was not denied by Dr. Hui any

treatment, albeit, there was no active Treatment Authorization Request (TAR) placed for approval by DIHS headquarters in Washington DC, nor was there an emergent need."

53. In response to Paragraph 53, the United States admits that a Treatment, Authorization, & Consultation Form dated July 13, 2006 indicates that authorized action was approved on July 13, 2006 for "ER evaluation and treatment 7-13-06." The United States denies the remaining allegations in this Paragraph.

54. In response to Paragraph 54, the United States admits that the Treatment, Authorization, & Consultation Form dated July 13, 2006 indicates "Spoke with [private] Dr. Wilkinson [ ] and [private] Dr. Masters [ ] who both strongly recommend admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant, return f/u with oncology depending upon findings, and potential treatment or surgery if malignant findings." The United States lacks sufficient information to either admit or deny the remaining allegations in Paragraph 54 and therefore denies these allegations.

55. In response to Paragraph 55, the United States admits that a Treatment, Authorization, & Consultation Form dated July 13, 2006 indicates that authorized action was approved on July 13, 2006 for "ER evaluation and treatment 7-13-06." The United States also admits that the Treatment, Authorization,

& Consultation Form dated July 13, 2006 indicates "There is now bleeding, drainage, malodorous smell and the lesion now appears to be 'exploding' for lack of better words, definitely macerated. Request for urology and oncology inpatient eval and treatment with outpatient follow-up."

56. In response to Paragraph 56, the United States admits that a record dated July 13, 2006 indicates that Castaneda was seen by private Dr. Juan Tovar at Scripps Mercy Chula Vista Hospital emergency room and that private Dr. Tovar noted "the patient has a 1.5 x 2-cm fungating lesion with slight clearish discharge, but no sign of induration, no signs of abscess," that Castaneda "has no lymphadenopathy that [private Dr. Tovar] can appreciate," and that the impression was "Penile mass, rule out cancer, versus infectious etiology." The United States denies the remaining allegations in Paragraph 56.

57. In response to Paragraph 57, the United States admits that a record dated July 13, 2006 indicates that Castaneda was seen by non-federal Defendant Dr. Hunting at Scripps Mercy Chula Vista Hospital and that non-federal Defendant Dr. Hunting noted that Castaneda "has no other obvious lesions, nothing suspicious for carcinoma," that "this is condyloma" and recommended referring Castaneda "back to his primary treating urologist, who can do the elective program, which has been advised." The United States lacks sufficient information to either admit or deny the remaining allegations in Paragraph 57 and therefore denies these allegations.

58. In response to Paragraph 58, the United States admits that a record dated July 17, 2006 indicates that Castaneda was seen by Physician's Assistant Walker on July 17, 2006, and that Physician's Assistant Walker noted Castaneda had "growing lesion to penis with severe phimosis, bleeding, and clear drainage from lesion area with foul odor," noted that Physician's Assistant Walker had spoken to private Dr. Wilkinson and private Dr. Masters "who both strongly recommended admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant, return f/u with oncology depending upon findings, potential treatment or surgery of any malignant findings."

59. In response to Paragraph 59, the United States admits that a record dated July 18, 2006 and authored by Physician's Assistant Walker indicates that "pt will be submitted for early release to further his opportunities for testing and potential treatment" and that Castaneda was not released at that time. The United State lacks sufficient information to either admit or deny the allegations in the last sentence in this Paragraph and therefore denies these allegations.

60. In response to Paragraph 60, the United States admits that a record dated July 26, 2006 indicates that Castaneda was seen by Physician's Assistant David Lusche ("Physician's Assistant Lusche") and that Physician's Assistant Lusche noted that he explained to Castaneda that "while a surgical procedure might

be recommended long-term, that does not imply that the Federal Government is obligated to provide that surgery if the condition is not threatening to life, limb, or eyesight." The United States further admits the last sentence of Paragraph 60.

61. In response to Paragraph 61, the United States admits that CCA Inmate/Resident Grievance Form Number 06-135 filed by Castaneda against Physician's Assistant Lusche was received on July 28, 2006 and that Physician's Assistant Lusche noted on the form that "I have met with Mr. Castaneda + explained that the urologist informed us that surgery at this point is elective in nature. As such the Federal Government will not approve this (elective) surgery. We will continue to monitor Mr. Castaneda's status at his request using the sick call system."

62. In response to Paragraph 62, the United States admits that a record dated August 9, 2006 indicates that Castaneda was seen by Physician's Assistant Lusche on August 9, 2006 and that Physician's Assistant Lusche noted that "Foreskin inflamed and taught around glans penis d/t inflammation. Whitish growth approx. 8 mm diameter noted at inferior margin of foreskin. No discharge seen. Glans penis appears pink," and explained to Castaneda that "the urologist informed our staff that surgical removal of the foreskin, at the current time, would be considered elective surgery; that as such the Federal Government will not provide for such surgery." The United States also admits the allegations in the last sentence of Paragraph 62.

63. In response to Paragraph 63, the United States admits that a record dated August 10, 2006 indicates that a sick call slip was received on August 10, 2006 and that the sick call slip indicated "no complaints of any symptoms; used form to communicate 'I am requesting that I have a biopsy performed to see what my condition is.'" The United States also admits that a Treatment Authorization Request dated August 11, 2006 was submitted by medical staff with reason for referral noted as "Biopsy lesion on Penis, surgical correction of glans penis" with provider of medical care listed as "[private] Dr. Robert Masters."

64. In response to Paragraph 64, the United States admits that a record dated August 22, 2006 indicates that Castaneda was taken to be seen by private Dr. Masters and that private Dr. Masters noted his impression that Castaneda had "Probable subprepucial condyloma accuminata," "diffuse vitiligo," and "Possible distal urethra condylomata," and that "The appropriate treatment for this problem would be circumcision. That would provide a biopsy and take care of the ongoing medical side effects of the lesion including infection and bleeding."

65. In response to Paragraph 65, the United States admits that private Dr Master's report dated August 22, 2006 to Physician's Assistant Walker produced by Plaintiffs' counsel indicates "We will arrange for admission for circumcision at local hospital. My principal hospital is Sharp Memorial."

66. In response to Paragraph 66, the United States admits that an undated notation states that "Spoke with Dr. Masters, Urologist, concerning his findings and diagnosis of the penial lesion, occasional bleeding and drainage, and urethral discomfort. According to Dr. Masters, this pt has condyloma acuminata like lesion to the foreskin of his penis that may or may not be growing into the urethra. There is a small hernia like area to the outer meatus and a phimosis due to the uncircumcized glans penis. Dr. Masters stated that elective procedures this patient may need in the future are cystoscopy and circumcision, the latter being first so as not to spread the condyloma into the urethra if it is not there already. He is not sure where the bleeding and drainage is coming from but suspects with cystoscopy this may be electively noted. This note can be found in patients electronic medical record." The United States denies the remaining allegations in this Paragraph.

67. In response to Paragraph 67, the United States admits that a record dated August 24, 2006 indicates that Castaneda was seen by Physician's Assistant Walker and that Physician's Assistant Walker noted that he told Castaneda that "the urologist diagnosed [Castaneda] with a condyloma acuminata that if the patient desired to pursue on an elective basis, could undergo circumcision with a cystoscopy. [Castaneda] states he understands and wants to know if his surgery will be done while housed in this facility, and he was told according to policy, this would not occur. [Castaneda] states he will

pursue upon release. Early release for medical reasons will be discussed with the medical team so that [Castaneda] may pursue treatment, surgery and f/u." The United States denies the allegations in the last sentence of this Paragraph.

68. In response to Paragraph 68, the United States admits that a record dated August 26, 2006 indicates that Castaneda was seen by medical staff on August 26, 2006 and that the medical staff noted that Castaneda "c/o stressful situation regarding medical status, unable to sleep @ night; states that ICE won't allow surgical operation for lesion on penis" and that Castaneda was given Diphenhydramine. The United States lacks sufficient information to either admit or deny the remaining allegations in Paragraph 68 and therefore denies these allegations.

69. In response to Paragraph 69, the United States admits that a record dated August 28, 2006 indicates that Castaneda was seen by medical staff on August 28, 2006 and that the medical staff noted that Castaneda stated "I have stress and can't sleep. I need medication," that "Pt indicates his stress is due to a chronic medical problem which the CCA has refused to have corrected as it is considered to be elective surgery," and that Castaneda was given Trazedone. The United States lacks sufficient information to either admit or deny the remaining allegations in Paragraph 69 and therefore denies these allegations.

70. In response to Paragraph 70, the United States admits that a memo dated August 30, 2006 from Federal Defendant Stephen Gonsalves addressed to Castaneda indicates that "This is to inform that the off-site specialist you were referred to for your medical condition reports that nay surgical intervention for the condition would be elective in nature. An independent review by our medical team is in agreement with the specialist's assessment. The care you are currently receiving is necessary, appropriate and in accordance with out policies."

71. The United States denies the allegations in Paragraph 71.

72. In response to Paragraph 72, the United States admits that a record dated September 8, 2006 indicates that Castaneda was seen by Registered Nurse Joanne Galano ("Nurse Galano") and that Nurse Galano noted that Castaneda stated "I have a lot pain and I'm having discharge," that ibuprofen had no effect, and that Castaneda stated he had "white discharge at night" and "It's like genital warts, but they're getting bigger."

73. In response to Paragraph 73, the United States admits that a record dated September 12, 2006 indicates that Castaneda was seen by Physician's Assistant Walker and that Physician's Assistant Walker noted that "pt states via sick call request he is having more penile lesion discharge and discomfort."

74. In response to Paragraph 74, the United States admits that a record dated September 14, 2006 indicates that Castaneda was seen by Registered Nurse Cindy Butler ("Nurse Butler") on September 14, 2006 and that Nurse Butler noted that Castaneda complained that "My situation is getting worst and worst! I'm suffering pain, I cannot sleep because of the pain. Also the discharge does not stop nor the bleeding. It smells really bad! States that the antibiotic prescribed two days ago is not effective now, nor has it ever been in the past." The United States denies the allegations in the last sentence of Paragraph 74.

75. In response to Paragraph 75, the United States admits that a record dated September 18, 2006 indicates that Castaneda's request for amoxicillin was denied on September 18, 2006.

76. In response to Paragraph 76, the United States admits that a record dated September 26, 2006 indicates that Castaneda was seen by Physician's Assistant Walker and that Physician's Assistant Walker noted that "another condyloma type lesion is forming and foul odo[r] emitting from uncircumcized area w th mushroomed wart." The United States admits that Physician's Assistant Walker discussed with Castaneda the possible early release of Castaneda and that Castaneda was a "mandatory hold due to legal status." The United States denies the remaining allegations in this Paragraph.

77. In response to Paragraph 77, the United States admits that a record dated October 17, 2006 indicates that on October 17, 2006, "CCA D control officer called and stated this detainee said he has blood coming out of his penis. CCA officer saw some dried blood on his boxers."

78. In response to Paragraph 78, the United States admits that a record dated October 23, 2006 indicates that Castaneda was seen by Physician's Assistant Walker on October 23, 2006 and that Physician's Assistant Walker noted that "TAR PLACED AND IS CURRENTLY PENDING REVIEW FOR SURGERY." The United States further admits that non-federal Defendant Mazur's record dated October 25, 2006 indicates that "Discussed with the DIHS Staff Physician. Circumcisions are not a covered benefit. Updated by Claudia Mazur, RN, CCM on Wednesday, October 25, 2006."

79. In response to Paragraph 79, the United States admits that TAR #20061019188300 indicates that "34 yo El Salvadoran male with 3 year history of genital wart on uncircumcized penis. Pt has developed a moderate sized condyloma to the glans penis and another one is developing within the foreskin. Pt has subsequent infections, bleeding due to very tight foreskin, some dysuria buy has been functioning in the past, and foul odor but no sign of infection. Pt has been seen by local urologist and oncologist and both are not impressed or possible cancerous lesion(s), however, there is an elective component to having the circumcision completed. Pt

has been submitting several requests for sick call that when evaluated there is not much else left to be done. Pt is demanding surgical treatment but is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite a while." The United States denies the remaining allegations in this Paragraph.

80. In response to Paragraph 80, the United States admits that TAR #20061019188300 indicates that "Pt is demanding surgical treatment but is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite a while." The United States denies the remaining allegations in this Paragraph.

81. In response to Paragraph 81, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

82. In response to Paragraph 82, the United States admits that a record dated November 9, 2006 indicates that Castaneda was seen by Nurse Butler and that Nurse Butler noted that Castaneda "States that his symptoms have worsened. State he feels a constant pinching pain, especially at night. States he constantly has blood discharge on his shorts. Also complains of a swollen rectum which he states make bowel movements hard[.] Can I get some of that milk of magnesia stuff?" The United States also admits that the same record dated November 9, 2006

indicates that Nurse Butler noted that Castaneda was "Informed that TAR in place for surgery and is pending approval," and Castaneda was prescribed milk of magnesia and docusate sodium. The United States lacks sufficient information to either admit or deny the remaining allegations in Paragraph 82 and therefore denies these allegations.

83. In response to Paragraph 83, the United States admits that a record dated November 14, 2006 indicates that Castaneda was seen by Physician's Assistant Lusche on November 14, 2006 and that Physician's Assistant Lusche noted that "Patient complains of new, 2nd penile lesion on underside, distal penis. Patient complains his penile lesions stain his underwear [and] requests assistance to obtain more fresh underwear."

84. In response to Paragraph 84, the United States admits that a record dated November 15, 2006 indicates that Castaneda was seen by Physician's Assistant Lusche on November 15, 2006 and that Physician's Assistant Lusche noted that "Wart is white in color, moist in appearance, approx. 2.5 c.m. diameter," that Castaneda's "Underwear is stained in multiple areas of front, in color light pink," that Castaneda stated "he cannot stand and urinate, because the urine 'sprays everywhere' and he cannot direct the stream" and that Castaneda be issued a pair of clean boxers daily. The United States denies the allegations in the last sentence in this Paragraph.

85. In response to Paragraph 85, the United States admits that the Medical Summary of Federal Prisoner/Alien in Transit form signed by Nurse Butler on November 17, 2006 indicates that the date Castaneda departed from DIHS San Diego was November 17, 2006, listed Trazedone as Castaneda's medication and no current medical problems on the form.

86. In response to Paragraph 86, the United States admits the allegations in Paragraph 86.

87. In response to Paragraph 87, the United States admits that a record dated November 24, 2006 indicates that Castaneda was booked at the San Pedro SPC on November 24, 2006. The United States lacks sufficient information to either admit or deny the remaining allegations in Paragraph 87 and therefore denies these allegations.

88. In response to Paragraph 88, the United States lacks sufficient information to either admit or deny the allegations and therefore denies these allegations.

89. In response to Paragraph 89, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

90. In response to Paragraph 90, the United States admits that a letter from the ACLU dated December 5, 2006 was faxed to Anthony Cerone and Federal Defendants Henneford, Molinar and

Gonsalves, and non-federal Defendant Mazur. The United States denies the allegation that the letter recounted the Castaneda's medical history since entering ICE custody and that the letter fully informed these officials of the situation.

91. In response to Paragraph 91, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

92. In response to Paragraph 92, the United States admits that TAR #20061205687800 contains the quoted language alleged in this Paragraph.

93. In response to Paragraph 93, the United States denies the allegations in the first sentence of this Paragraph and lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

94. In response to Paragraph 94, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

95. In response to Paragraph 95, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

96. In response to Paragraph 96, the United States denies these allegations.

97. In response to Paragraph 97, the United States admits that an email dated December 19, 2006 from Federal Defendant Molinar to Tom Jawetz contains the quoted language alleged in this Paragraph. The United States lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

98. In response to Paragraph 98, the United States admits that a record dated December 26, 2006 indicates that Castaneda was seen by Registered Nurse Shelly Hollandsworth ("Nurse Hollandsworth") on December 26, 2006 and that Nurse Hollandsworth noted that Castaneda "here for c/o blood coming from penis. States saw Dr. Greenburg a couple weeks ago and doesn't know the results of that appt." The United States denies the remaining allegations in this Paragraph.

99. In response to Paragraph 99, the United States admits that a record dated January 11, 2007 indicates that Castaneda was seen by Nurse Hollandsworth and that Nurse Hollandsworth noted "Knowledge deficit related to f/u." The United States also admits that another record dated January 11, 2007 indicates that Castaneda was seen by Registered Nurse Danielle Didonna ("Nurse Didonna") and that Nurse Didonna noted "return for status HPV infection, urology consult pended/denied? Pt was seen by [private] Urology Dr. Greenburg who recommends advanced urology specialty care. Pt must have a biopsy and further treatment recommendations

made. Pt states he is in severe pain and BID tramadol not helping much," that "specialty eval with biopsy pending scheduled appt," and that "R/O Carcinoma of Penis secondary to HPV infection."

100. In response to Paragraph 100, the United States admits that a letter dated January 19, 2007 from a staff attorney with the ACLU was faxed to Norma Bonales-Garibei and Federal Defendants Henneford and Molinar, and non-federal Defendant Mazur.

101. In response to Paragraph 101, the United States admits that a record dated January 24, 2007 indicates that Castaneda was seen by Nurse Practitioner Brinkley and that Nurse Practitioner Brinkley noted that "Consulted with Dr. Collins, verbally approved TAR to see [private] Dr. Asghar Askari[.]"

102. In response to Paragraph 102, the United States admits that a record dated January 25, 2007 indicates that private Dr. Askari saw Castaneda on January 25, 2007 for a consultation and that private Dr. Askari noted that "Upon exam it revealed Fungating with penile lesion with poss left lymphadenectomy, most likely penile cancer," that Castaneda "should be scheduled for a penile Biopsy," and that private Dr. Askari's "office will get authorization and schedule this as an out-pt at the hospital under general anesthesia [sic]." The United States lacks sufficient information to either admit or deny the allegations in the last sentence of this

Paragraph and therefore denies these allegations. The United States denies the remaining allegations in this Paragraph.

103. In response to Paragraph 103, the United States admits that a letter dated January 29, 2007 from the ACLU regarding Castaneda's medical treatment was addressed to Captain Jarres and Federal Defendant Dr. Shack. The United States admits that records indicate that a biopsy was approved for Castaneda. The United States denies the remaining allegations in this Paragraph.

104. In response to Paragraph 104, the United States denies these allegations.

105. In response to Paragraph 105, the United States admits that records from Harbor-UCLA indicate that Castaneda went to Harbor-ULA Hospital on or about February 8, 2007 and was admitted on or about February 13, 2007 with a diagnosis of squamous cell carcinoma of the penis. The United State lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

106. In response to Paragraph 106, the United States admits that Harbor-UCLA records indicate that Castaneda's penis was partially amputated on February 14, 2007.

107. In response to Paragraph 107, the United States admits that Harbor-UCLA records indicate that Castaneda's partial penectomy left Castaneda

with a 2 c.m. stump and that the remaining 8 c.m. sample of his penis was sent to pathology which revealed that Castaneda had a keratinizing type of invasive squamous cell carcinoma.

108. In response to Paragraph 108, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

109. In response to Paragraph 109, the United States admits that it has been informed by Plaintiffs' counsel that Castaneda died of cancer on February 16, 2008. The United States lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

110. In response to Paragraph 110, the United States admits that the DIHS Medical Dental Detainee Covered Services Package states that "The DIHS Medical Dental Detainee Covered Services Package primarily provides health care services for emergency care. Emergency care is defined as 'a condition that is threatening to life, limb, hearing, or sight.'" The United States lacks sufficient information to either admit or deny the remaining allegations in this Paragraph and therefore denies these allegations.

111. In response to Paragraph 111, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

112. In response to Paragraph 112, the United States incorporates by reference herein its responses to the preceding Paragraphs.

113. The United States denies the allegations in the first sentence of Paragraph 113. The United States admits that Plaintiffs bring this action under California's wrongful death and survival statutes and federal common law survival rule.

114. Paragraph 114 contains conclusions of law to which no response is required. To the extent that a response is required, the United States admits only that Castaneda presented an administrative tort claim to the Department of Health and Human Services, within the meaning of the Federal Tort Claims Act, and that more than six months elapsed between the presentation of such claim and the filing of this Complaint. The United States denies all other allegations in this Paragraph.

115. The United States denies the allegations in Paragraph 115.

116. The United States denies the allegations in Paragraph 116.

117. The United States denies the allegations in Paragraph 117.

118. In response to Paragraph 118, the United States incorporates by reference herein its responses to the preceding Paragraphs.

119. The United States denies the allegations in the first sentence of Paragraph 119. The United States admits that Plaintiffs bring this action under California's wrongful death and survival statutes and federal common law survival rule.

120. Paragraph 120 contains conclusions of law to which no response is required. To the extent that a response is required, the United States admits only that Castaneda presented an administrative tort claim to the Department of Health and Human Services, within the meaning of the Federal Tort Claims Act, and that more than six months elapsed between the presentation of such claim and the filing of this Complaint. The United States denies all other allegations in this Paragraph.

121. The United States denies the allegations in Paragraph 121.

122. The United States denies the allegations in Paragraph 122.

123. The United States denies the allegations in Paragraph 123.

124. In response to Paragraph 124, the United States incorporates by reference herein its responses to the preceding Paragraphs.

125. The United States denies the allegations in the first sentence of Paragraph 125. The United States admits that Plaintiffs bring this action under California's wrongful death and survival statutes and federal common law survival rule.

126. Paragraph 126 contains conclusions of law to which no response is required. To the extent that a response is required, the United States admits only that Castaneda presented an administrative tort claim to the Department of Health and Human Services, within the meaning of the Federal Tort Claims Act, and that more than six months elapsed between the presentation of such claim and the filing of this Complaint. The United States denies all other allegations in this Paragraph.

127. The United States denies the allegations in Paragraph 127.

128. The United States denies the allegations in Paragraph 128.

129. The United States denies the allegations in Paragraph 129.

130. In response to Paragraph 130, the United States incorporates by reference herein its responses to the preceding Paragraphs.

131. The United States denies the allegations in the first sentence of Paragraph 131. The United States admits that Plaintiffs bring this action under California's wrongful death and survival statutes and federal common law survival rule.

132. Paragraph 132 contains conclusions of law to which no response is required. To the extent that a response is required, the United States admits only that Castaneda presented an administrative tort claim to the Department of Health and Human

Services, within the meaning of the Federal Tort Claims Act, and that more than six months elapsed between the presentation of such claim and the filing of this Complaint. The United States denies all other allegations in this Paragraph.

133. The United States denies the allegations in Paragraph 133.

134. The United States denies the allegations in Paragraph 134.

135. The United States denies the allegations in Paragraph 135.

136. The United States denies the allegations in Paragraph 136.

137. The United States denies the allegations in Paragraph 137.

138. In response to Paragraph 138, the United States incorporates by reference herein its responses to the preceding Paragraphs.

139. The United States denies the allegations in Paragraph 139. The United States admits that Plaintiffs bring this action under California's wrongful death and survival statutes and federal common law survival rule.

140. The United States denies the allegations in Paragraph 140.

141. The United States denies the allegations in Paragraph 141.

142. The United States denies the allegations in Paragraph 142.

143. The United States denies the allegations in Paragraph 143.

144. The United States denies the allegations in Paragraph 144.

145. The United States denies the allegations in Paragraph 145.

146. The United States denies the allegations in Paragraph 146.

147. The United States denies the allegations in Paragraph 147.

148. The United States denies the allegations in Paragraph 148.

149. The United States denies the allegations in Paragraph 149.

150. In response to Paragraph 138, the United States incorporates by reference herein its responses to the preceding Paragraphs.

151. The United States denies the allegations in Paragraph 151. The United States admits that Plaintiffs bring this action under California's wrongful death and survival statutes and federal common law survival rule.

152. The United States denies the allegations in Paragraph 152.

153. The United States denies the allegations in Paragraph 153.

154. The United States denies the allegations in Paragraph 154.

155. The United States denies the allegations in Paragraph 155.

156. The United States denies the allegations in Paragraph 156.

157. The United States denies the allegations in Paragraph 157.

158. The United States denies the allegations in Paragraph 158.

159. The United States denies the allegations in Paragraph 159.

160. The United States denies the allegations in Paragraph 160.

161. The United States denies the allegations in Paragraph 161.

162 to 185. The United States does not respond to the allegations involving other Defendants alleged in Paragraphs 162 through 185. To the extent a response is required, the United States lacks sufficient information to either admit or deny these allegations and therefore denies these allegations.

The last two Paragraphs contain Plaintiffs' Jury Trial Demand and Prayer for Relief and as such

requires no response, but insofar as a response is required, the United States denies these allegations.

Any allegations to which a response is deemed necessary and which have not been admitted, denied or otherwise responded to herein, are hereby denied.

In further answer to Plaintiffs' Second Complaint, the United States alleges as follows:

FIRST AFFIRMATIVE DEFENSE

The United States and its agents and employees exercised due care and diligence and met the standard of care in this community with respect to the medical care and treatment Castaneda received from the United States and which Plaintiffs have made the basis for this action. No negligent or wrongful act of the United States, or any of its employees or agents while acting in the scope of their employment with the United States, was the actual or proximate cause or in any way contributed to, the injuries, damages or losses allegedly sustained by Castaneda or Plaintiffs. If any such negligent or wrongful act or omission is found to have existed, the United States alleges that its damages should be diminished in proportion to the amount of fault attributable to Castaneda and any other party.

SECOND AFFIRMATIVE DEFENSE

Castaneda was fully informed of the risks and knew the hazards involved in the medical treatment

rendered to Castaneda by the United States and voluntarily consented thereto, thereby assuming all of the said risks and thereby becoming the proximate/ legal cause of any injury, damage, or loss to Castaneda and/or Plaintiffs.

THIRD AFFIRMATIVE DEFENSE

Any injury, damage or loss suffered by Castaneda and/or Plaintiffs was caused by the negligent or willful failure of Castaneda to follow the advice, instructions and orders of attending physicians, nurses and other medical personnel and in otherwise failing to exercise ordinary care on Castaneda's own behalf.

FOURTH AFFIRMATIVE DEFENSE

Any injury, damage or loss suffered by Castaneda was caused by a failure of Castaneda to use reasonable means to prevent aggravation of Castaneda's condition and to use reasonable means to mitigate damages to Castaneda.

FIFTH AFFIRMATIVE DEFENSE

Any injury, damage or loss suffered by Castaneda was actually and proximately caused, compounded or created by Castaneda's medical conditions and by occurrences or incidents prior and/or subsequent to any medical care and treatment provided to Castaneda by the United States, and the United

States is not liable for said pre-existing, intervening and/or superseding medical conditions, occurrences or incidents. The United States and its health-care providers are not liable for professional negligence or malpractice for any occurrence or results solely on the basis that the occurrence or result was caused by the natural course of a disease process or condition, or was the natural or expected result of reasonable treatment rendered for the disease process or condition.

SIXTH AFFIRMATIVE DEFENSE

Any damages, injuries or losses suffered by Castaneda was actually and proximately caused, compounded, aggravated or created by the independent, pre-existing, intervening or superseding acts or omissions of a third party or parties or were so caused by the contributory negligence of Castaneda and the above said third party or parties' acts or omissions. To the extent Castaneda's and/or Plaintiffs' alleged damages were so caused in whole or in part, then should the United States be found in any way liable in this matter, the United States's liability for Castaneda's and/or Plaintiffs' non-economic damages should be allocated to the United States in direct proportion to the United States's percentage of fault, if any.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' action against the United States shall be tried by the Court pursuant to 28 U.S.C. § 2402.

EIGHTH AFFIRMATIVE DEFENSE

Pursuant to California Civil Code § 3333.1, the United States may elect to introduce evidence of any amount(s) paid or payable to or for Plaintiffs as a benefit or collateral benefit as a result of the injury or injuries, damages or losses alleged in this action. The United States is not liable for payment or reimbursement to any payor, by way of payor's subrogation to the rights of the Plaintiffs or otherwise, for payor's payment of said benefits to Plaintiffs.

NINTH AFFIRMATIVE DEFENSE

The Complaint fails to state facts sufficient to constitute a cause of action.

TENTH AFFIRMATIVE DEFENSE

The United States is entitled to any offset or credit for any and all benefits or collateral benefits paid or payable to or for Plaintiffs for the injuries, damages or losses which payment was made by the United States or funded by the United States through a state, county or city government or other governmental entity.

ELEVENTH AFFIRMATIVE DEFENSE

In the event that the United States should be found liable to the Plaintiffs (which supposition is denied and merely stated for the purpose of this affirmative defense), the United States may elect to have future damages, if in excess of the amount specified in California Code of Civil Procedure § 667.7, paid in whole or in part as provided under that section.

TWELFTH AFFIRMATIVE DEFENSE

In the event that the United States should be found liable to Plaintiffs (which supposition is denied and merely stated for the purpose of this affirmative defense), the damages for non-economic losses shall not exceed the amount specified in California Civil Code § 3333.2(b).

THIRTEENTH AFFIRMATIVE DEFENSE

Liability, if any, for all non-economic damages shall be allocated in direct proportion to each tortfeasor's percentage of fault pursuant to California Civil Code § 1431, *et seq.*

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' damages, if any, are limited to the amount originally stated or specified in Castaneda's administrative claim, if any.

FIFTEENTH AFFIRMATIVE DEFENSE

Attorney's fees are taken out of any judgment or settlement and shall not exceed 25 percent of said amount. *See* 28 U.S.C. § 2678.

SIXTEENTH AFFIRMATIVE DEFENSE

The Federal Defendants were at all times acting pursuant to their lawful authority.

SEVENTEENTH AFFIRMATIVE DEFENSE

No wrongful act or omission of any federal employee of the United States caused or in any way contributed to the injury and losses alleged by Plaintiffs.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs cannot recover punitive damages against the United States. *See* 28 U.S.C. § 2674.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to an award of pre-judgment interest, costs or disbursements as to the United States pursuant to 28 U.S.C. §§ 2674 and 2678.

WHEREFORE, the United States prays for judgment as follows:

1. That judgment be entered for the United States and against Plaintiffs;

2. That Plaintiffs' Second Amended Complaint and action be dismissed in its entirety as to the United States;

3. That the United States be awarded costs and disbursements in this action; and

4. That the United States be awarded such other and further relief as this Court may deem appropriate.

Dated:
March 17, 2008

Respectfully submitted,
THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

//s//

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Attorney for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FRANCISCO CASTANEDA, Plaintiff, v. UNITED STATES OF AMERICA et al. Defendants.	No. CV 07-7241 DDP (JCx)

DEFENDANT UNITED STATES OF AMERICA'S NOTICE OF ADMISSION OF LIABILITY FOR MEDICAL NEGLIGENCE

(Filed Apr. 24, 2008)

Defendant United States of America, for itself and no others, hereby gives notice to the Honorable Court and the parties to this action as follows:

Defendant United States of America admits liability on plaintiffs' claims for medical negligence brought under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2671 et seq.), as alleged in the first cause of action of plaintiff's Second Amended Complaint. By doing so, the United States admits only negligence and causation on the first cause of action and does not admit either the nature or extent of plaintiffs' claims for damages.

Dated: April 24, 2008

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
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Chief, Civil Division

/s/
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UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

YANIRA CASTANEDA, as personal, representative of the ESTATE OF FRANCISCO CASTANEDA; VANESSA CASTANEDA, as heir and beneficiary of the Estate, by and through her mother and guardian, LUCIA PELAYO, Plaintiffs, vs. THE UNITED STATES OF AMERICA, MICHAEL CHERTOFF,	Case No.: CV07-07241 DDP (JCx) **THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** (Filed May 29, 2008) **First Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION)** – FTCA Claim against UNITED STATES for Medical Negligence (Non-Jury Claim)

in his official capacity; DEPARTMENT OF HOMELAND SECURITY; IMMIGRATION AND CUSTOMS ENFORCEMENT; DIVISION OF IMMIGRATION HEALTH SERVICES; GEORGE MOLINAR, in his individual capacity; CHRIS HENNEFORD, in his individual capacity; GENE MIGLIACCIO, in his individual capacity; TIMOTHY SHACK, M.D., in his individual capacity; ESTHER HUI, M.D., in her individual capacity; STEPHEN GONSALVES, in his individual capacity; CLAUDIA MAZUR, in her individual capacity; DANIEL HUNTING, M.D.; S. PASHA, in his/her individual capacity; M. SHERIDAN, in his/her individual capacity; and A. LEONG, in his/her individual capacity; and DOES 1-10,	**Second Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION)** – FTCA Claim against UNITED STATES for Negligent Establishment of Policy for Provision of Medical Care to Immigration Detainees (Non-Jury Claim)
	Third Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – FTCA Claim against the UNITED STATES for Negligent Application of Policy for Provision of Medical Care to Immigration Detainees (Non-Jury Claim)
	Fourth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – FTCA Claim against UNITED STATES for Negligent Hiring/ Retention (Non-Jury Claim)
	Fifth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – FTCA Claim against UNITED STATES for Negligent Supervision (Non-Jury Claim)
Defendants.	

) **Sixth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION)** – FTCA Claim against UNITED STATES for Negligent Supervision (Non-Jury Claim)

) **Seventh Cause of Action (SURVIVAL ACTION)** – FTCA Claim against UNITED STATES for Intentional Infliction of Emotional Distress (Non-Jury Claim)

) **Eighth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION)** – FTCA Claim against UNITED STATES for Intentional and/or Negligent Failure to Summon Medical Care for Prisoner in Immediate Need of Care (Non-Jury Claim)

) **Ninth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION)** – *Bivens* Claim for Inadequate Medical Care against all Individually Named Defendants (except Hunting) and DOES 1-10

Tenth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – *Bivens* Claim for Equal Protection Violation against all Individually Named Defendants (except Hunting) and DOES 1-10

Eleventh Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – Section 1983 Claim against PASHA, SHERIDAN, LEONG, and DOES 1-10

Twelfth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – Medical Negligence Claim against PASHA, SHERIDAN, LEONG, and DOES 1-10

Thirteenth Cause of Action (WRONGFUL DEATH AND SURVIVAL ACTION) – Medical Negligence Claim against HUNTING and DOES 1-10

Fourteenth Cause of Action -- Facial and As Applied Challenge to Constitutionality of DIHS

) Detainee Covered
) Services Package –
) Request for Injunctive
) and Declaratory Relief
) Against UNITED
) STATES, CHERTOFF,
) ICE, DIHS, and DHS

Plaintiffs, YANIRA CASTANEDA, as personal representative of the ESTATE OF FRANCISCO CASTANEDA; and VANESSA CASTANEDA, as heir and beneficiary of the Estate, by and through her mother and guardian, LUCIA PELAYO (collectively "PLAINTIFFS"), by and through their undersigned counsel, hereby file the Third Amended Complaint and Demand for Jury Trial and state as follows:

PRELIMINARY STATEMENT

1. FRANCISCO CASTANEDA ("CASTANEDA"), a former immigration detainee, received such grossly inadequate medical care for a penile lesion while in California State and federal custody that he developed fatal penile cancer, had his penis amputated, and died from cancer on February 16, 2008. This lawsuit charges the federal and California governments, and/or their agents, with constitutional violations, medical negligence and other torts, based on their egregious medical neglect of CASTANEDA.

2. The Defendants' refusal to provide CASTANEDA reasonable and humane medical care while he was in custody was tantamount to torture. He was forced to endure one of the most painful, terrifying,

and humiliating experiences imaginable. CASTANEDA continually pleaded for the biopsy recommended by California medical providers, federal medical providers, and outside specialists selected by the federal government, but was denied this simple and inexpensive diagnostic test. As a result, he was denied medical treatment that would have prevented his penile cancer from spreading and becoming terminal.

3. CASTANEDA was held in custody by the California Department of Corrections from December 6, 2005 to March 26, 2006. During this time, he was examined by California medical providers who documented a 2 cm. by 2 cm. lesion on his penis and issued multiple orders for a urologic consult and biopsy. Yet, CASTANEDA was denied access to a urologist and was never given a biopsy.

4. CASTANEDA was detained in Immigration and Customs Enforcement ("ICE") custody from March 27, 2006 to February 5, 2007. During his over ten months in ICE custody, federal medical providers and outside medical specialists selected by the federal government documented that the lesion on CASTANEDA's penis might be cancerous, recommended a biopsy, and recognized that the need for diagnosis and treatment was urgent. Yet, the federal government denied CASTANEDA the medical diagnosis and treatment both recommended and needed. All the while, CASTANEDA's condition grew worse. He experienced extreme pain, swelling, tumor growth, bleeding, drainage and a discharge, a foul odor, and the inability to urinate standing up.

5. Finally, after prolonged pressure from the ACLU National Prison Project, the federal government scheduled CASTANEDA for a biopsy to occur in February 2007, but then released CASTANEDA from custody just a few days before the scheduled biopsy, presumably so it would not have to pay for the procedure or any subsequent medical treatment he would need. Ultimately, the federal government *never* provided CASTANEDA with any treatment for his obvious penile disease during his entire ten-month detention.

6. Shortly after his release from ICE custody, CASTANEDA went to the emergency room at Harbor-UCLA Hospital in Los Angeles on February 8, 2007. After performing a biopsy, Harbor-UCLA doctors diagnosed him with invasive squamous cell carcinoma of the penis and amputated his penis on Valentine's Day, February 14, 2007. By the time he received treatment at Harbor-UCLA, CASTANEDA's penile cancer had already metastasized (spread) to his lymph nodes. He endured painful and grueling medical treatment during his last year of life, including chemotherapy and surgery, and incurred a crushing debt for his medical treatment.

JURISDICTION AND VENUE

7. Jurisdiction of the court is proper under 28 U.S.C. §§ 1331, 1343(3), and 1346.

8. Venue is proper in this district pursuant to 28 USC § 139(b)(2), in that a substantial part of the

acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed. Venue is also proper pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed and Plaintiff Yanira Castaneda is a resident of the judicial district.

9. This is an action for medical negligence and civil rights violations pursuant to applicable California statutes, 42 U.S.C. § 1983, 28 U.S.C. § 2674 (the Federal Tort Claims Act or "FTCA"), *Bivens* claims for inadequate medical care and equal protection violations under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and claims challenging the constitutionality of certain Immigration Detainee Covered Services Package policies, and their application, under the Fifth, Eighth and Fourteenth Amendments. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

10. Compensatory damages are sought pursuant to applicable California statutes, 42 U.S.C. § 1983, the Federal Tort Claims Act, and the *Bivens* claims. Punitive damages are sought against all Defendants sued in their individual capacity pursuant to applicable California statutes, 42 U.S.C. § 1983, and the *Bivens* claims. Attorneys' fees and costs are sought pursuant to 42 U.S.C. § 1988 for PLAINTIFFS' claim

under 42 U.S.C. § 1983 and pursuant to applicable California law for PLAINTIFFS' state law claims.

11. This Court has supplemental jurisdiction to consider state causes of action under 28 U.S.C. § 1367, as the ancillary state claims "form part of the same case or controversy" as other counts for which this Court has jurisdiction.

12. All governmental entities were notified of this claim in a timely fashion and all administrative exhaustion and notice requirements under both the FTCA and state statutes have been satisfied.

PARTIES

13. FRANCISCO CASTANEDA was an adult male natural person, born on February 10, 1972, and was a resident of the State of California, County of Los Angeles. At all relevant times, he was detained and in the custody of either the United States as a "civil or pre-trial detainee" or the State of California as a convicted prisoner. He died in Los Angeles on February 16, 2008.

14. YANIRA CASTANEDA is an adult female natural person and a resident of the State of California, County of Los Angeles. She is the sister of CASTANEDA and is the duly appointed, qualified and acting executor of decedent's Estate and the personal representative of his Estate in this lawsuit. No other person has a superior right to commence the action or proceeding or to be substituted for the

decedent in the pending action or proceeding. As personal representative of the Estate, YANIRA CASTANEDA is bringing both Wrongful Death and Survival actions on behalf of the Estate, CASTANEDA, and his heir and beneficiary, VANESSA CASTANEDA, against the Defendants.

15. VANESSA CASTANEDA is a minor female natural person, born on [Date Of Birth Omitted], and is the sole heir and daughter of FRANCISCO CASTANEDA. She is a resident of Arizona. She was born in California and is a United States citizen.

16. LUCIA PELAYO is the natural mother of VANESSA CASTANEDA and is her guardian. She is a resident of Arizona. She was born in California and is a United States citizen.

17. THE UNITED STATES OF AMERICA ("UNITED STATES" or "the GOVERNMENT") is a governmental entity with jurisdiction and control over the Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE") and the Department of Immigration Health Services ("DIHS"). CASTANEDA was detained in two ICE facilities during the relevant time period: San Diego Correctional Facility ("SDCF") in San Diego and San Pedro Service Processing Center ("San Pedro") in Los Angeles County.

18. The DEPARTMENT OF HOMELAND SECURITY ("DHS") is a government agency that has jurisdiction over ICE and DIHS, and provides security services to the American homeland.

19. IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE") is the largest investigative arm of DHS and is responsible for eliminating vulnerabilities in the nation's borders and for providing economic, transportation and infrastructure security. According to its website, ICE makes use of its resources and expertise to transport aliens, to manage them while in custody and while waiting for their cases to be processed, and to remove unauthorized aliens from the United States when so ordered.

20. The DIVISION OF IMMIGRATION HEALTH SERVICES ("DIHS") is a government agency that provides or arranges for health care services for undocumented migrants detained by ICE. DIHS, a component of the U.S. Department of Health and Human Services ("HHS"), provides and oversees health care services to immigration detainees pursuant to an Interagency Agreement between ICE and HHS. DIHS provides primary on-site health care to detainees at both SDCF and San Pedro.

21. MICHAEL CHERTOFF ("CHERTOFF") is the Secretary of DHS and is being sued in his official capacity. As Secretary, he is the final policy maker for all policies promulgated and enforced by DHS.

22. S. PASHA ("PASHA"), M. SHERIDAN ("SHERIDAN"), and A. LEONG ("LEONG") were medical providers employed by the State of California in the Department of Corrections and Rehabilitation,

who were acting under color of state law, while ostensibly providing medical services to the CASTANEDA during his incarceration by the State of California.

23. GEORGE MOLINAR ("MOLINAR"), at all relevant times, was the ICE Officer-in-Charge at San Pedro and was directly responsible for the care and medical treatment received by detainees at that facility. He was also responsible for arranging specialized health care and hospitalization for detainees within the local community. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

24. CHRIS HENNEFORD ("HENNEFORD"), at all relevant times, was the Health Services Administrator of San Pedro. As the Health Services Administrator, HENNEFORD was responsible for the daily administration and functioning of the health care program and medical services; and provided supervision and direction to all health services staff at San Pedro. HENNEFORD was the direct avenue of communication between DIHS medical staff and ICE officials, including the Officer-in-Charge. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane

medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

25. GENE MIGLIACCIO ("MIGLIACCIO"), at all relevant times, was Director of DIHS. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper

* * *

[Page Nine Missing In Original]

in her individual capacity.

29. STEPHEN GONSALVES ("GONSALVES"), at all relevant times, was the Health Services Administrator at SDCF. At all material times, he was aware that CASTANEDA had a life threatening medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic and humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. He is being sued in his individual capacity.

30. DANIEL HUNTING, M.D. ("HUNTING"), at all relevant times, was a private physician licensed to practice medicine in the State of California and was practicing medicine in San Diego, California. He rendered medical services to CASTANEDA on July

13, 2006 at Scripps Mercy Chula Vista Hospital. He is being sued in his individual capacity.

31. Defendants DOES 1-5 are business entities of unknown form who were the employers of the individually named Defendants and/or DOES 5-10. Defendants DOES 1-10 are herein sued under fictitious names. Their true names and capacities are unknown to PLAINTIFFS. Based on information and belief, PLAINTIFFS allege that DOES 5-10 were the employees, officers, directors, managing agents, and/or supervisors of the UNITED STATES, CALIFORNIA, and/or DOES 1-10, who were acting within the scope and course of their employment and authority at all times relevant to this Complaint.

FACTUAL ALLEGATIONS

32. CASTANEDA was detained in the California Department of Corrections and Rehabilitation ("DOC") after conviction by the State of California on December 6, 2005 and held until his early release date on March 26, 2006.

33. On December 8, 2005, CASTANEDA was seen by a DOC medical provider who ordered a "follow up with M.D." regarding a growth on CASTANEDA's penis.

34. On December 27, 2005, a DOC medical provider, believed to be LEONG, entered an order to refer CASTANEDA to a urologist. Despite this referral, CASTANEDA was never allowed to see a

urologist during the course of his confinement. CASTANEDA's confinement lasted for approximately another three months.

35. On January 13, 2006, CASTANEDA filled out a Health Services Request Form, complaining of back and kidney pain and requested medical attention from the DOC. It appears that the medical staff scheduled appointments on January 20 and/or 24th, but he was not brought to the medical center by prison guards as ordered.

36. On January 30, 2006, CASTANEDA filled out another Health Services Request Form, stating that his genital warts needed to be removed, he needed help, and he needed to see a doctor soon.

37. On February 7, 2006, CASTANEDA was examined in the "wart clinic" and the DOC medical provider, believed to be PASHA noted a 2 cm. x 2 cm. raised white and yellow lesion on his foreskin. The doctor's assessment was that squamous cell cancer and Chlamydia needed to be ruled out. For the second time, a DOC doctor ordered an "urgent urology referral." Antibiotics were also prescribed.

38. By February 17, 2006, CASTANEDA still had not received his antibiotics and they were re-ordered. At that time, SHERIDAN was made aware of CASTANEDA's medical condition and need for urgent urologic care.

39. On February 27, 2006, CASTANEDA was again seen by a DOC provider, who documented that

he was unable to retract CASTANEDA's prepuce (the uncircumcised skin on the head of his penis) and that his lesion was foul smelling. He also documented that CASTANEDA had been referred to a urologist for removal of the lesion.

40. On March 7, 2006, CASTANEDA was seen by a medical provider (PASHA) for the last time during his detention with DOC. PASHA again documented that CASTANEDA had a "2cm x 2cm raised white irregular shaped lesion to his foreskin." However, nothing was done to diagnose or treat this problem and CASTANEDA was never provided the urgent urologic consult ordered in December 2005 and again in February 2006.

41. CASTANEDA was transferred to federal custody (SDCF) on March 27, 2006. He immediately brought his medical condition to the attention of the SDCF staff upon admission, specifically informing them of a lesion on his penis that was becoming painful, growing in size, bleeding, and exuding discharge.

42. On March 28, 2006, CASTANEDA was examined by Lieutenant Anthony Walker ("Walker"), a Physician's Assistant, as part of the medical intake screening process at SDCF. Walker noted CASTANEDA's history of genital warts and his plan called for a urology consult "ASAP" with a request for biopsy.

43. CASTANEDA was next seen by a medical provider on April 11, 2006, when Walker again

assessed CASTANEDA as having a penile lesion that required ruling out cancer. Walker also documented that CASTANEDA's mother died of pancreatic cancer at age thirty-nine.

44. CASTANEDA was not seen again by a medical provider until April 28, 2006, when he informed Walker that the lesion on his penis smelled worse and was now draining pus. Walker noted that the lesion was more macerated at the glans (penis head) and emitted a foul odor.

45. Medical personnel filed a Treatment Authorization Request form ("TAR") in April 2006 with DIHS, requesting approval to have the lesion removed for purposes of a biopsy and to have CASTANEDA's penis circumcised. The TAR noted that CASTANEDA's penile lesion had grown and that his pain level was measured at 8 out of 10 during urination and erection. The TAR also observed that "[patient] ("pt") has been treated for possible infections to no avail. Lesion has foul odor." The form further concluded that a biopsy should be performed "due to family history and pt discomfort, sooner the better."

46. The TAR was not approved until May 31, 2006, approximately two months after Walker ordered the consult and biopsy.

47. On June 7, 2006, the GOVERNMENT sent CASTANEDA to an outside specialist of its choice – John R. Wilkinson, M.D., Hematology Oncology Diplomat. CASTANEDA presented with a history of a fungating lesion on the left side of his foreskin. The

lesion was growing and Dr. Wilkinson documented his agreement with the medical staff at SDCF "that this may represent either a penile cancer or a progressive viral based lesion." His medical record states: "Strongly agree[d] that it requires urgent urologic assessment of biopsy and definitive treatment. In this extremely delicate area and [sic] there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated . . . I spoke with the physicians at the correctional facility. I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost effective. They understand the need for urgent diagnosis and treatment."

48. Dr. Wilkinson also documented that there was "no evidence of regional lymphadenopathy, no sign of distant metastasis." This meant that there was no observable evidence that the cancer had metastasized at that point.

49. On June 7, 2006, HUI documented a conversation she had with Dr. Wilkinson regarding his examination of CASTANEDA. HUI specifically noted that CASTANEDA had a penile lesion that required a biopsy and that Dr. Wilkinson offered to admit CASTANEDA to the hospital. She then documented that the biopsy, a diagnostic procedure to rule out a life threatening disease, was an "elective outpatient procedure" and therefore refused to admit CASTANEDA for treatment at that time. She also never made arrangements for an outpatient biopsy, even though

Dr. Wilkinson's note documented that HUI wished "to pursue outpatient biopsy which would be more cost effective."

50. On June 12, 2006, CASTANEDA filed a grievance asking for the surgery recommended by Dr. Wilkinson: "[Dr. Wilkinson] gave his professional opinion and recommended that I should be admitted and that surgery should be performed. At this time, Dr. Hui decided against the proposed surgery and denied the admittance. I am in a considerable amount of pain and I am in desperate need of medical attention."

51. On June 23, 2006, CASTANEDA informed Walker that his penis was getting worse: there was more swelling to the area, a foul odor, drainage, it was more difficult to urinate, and he was bleeding from the foreskin. Walker documented that there was "obvious slightly purulent drainage from foreskin of penis next to lesion on penis." Nevertheless, the GOVERNMENT did nothing to treat the problem.

52. Also on June 23, 2006, Dr. Wilkinson's office received a telephone call from SDCF reporting that CASTANEDA's "foreskin lesion is increased in size and pressing further on his penis causing increasing discomfort." Dr. Wilkinson noted that CASTANEDA was to see Dr. Robert Masters, M.D., a urologist, and sent a copy of CASTANEDA's medical records to Dr. Masters

53. On June 30, 2006, Walker authored a late entry progress note, stating that CASTANEDA "DOES

NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory." Walker told CASTANEDA that he did not have cancer although Walker documented that he was not sure "what the lesion would present, if and when, the biopsy was completed." The medical record documented that "this is something that can be managed also upon his release as well if that is the concern here," that there is "a three-year history with the past few months of the lesion looking and acting a bit more angry," and that there is "a severe deformed uncircumcised foreskin growth that could use attention but this lesion is an impediment at this time according to Dr. Masters." Walker counseled CASTANEDA to be patient and wait.

54. On July 12, 2006, Walker responded to CASTANEDA's grievance, stating: "Not resolved. Patient wants further evaluation, assessment and treatment. Patient will be reassessed and further outside resources readdressed. Patient (sic) explained that he was never denied any treatment but pre authorization must be gained prior to any treatment."

55. On July 12, 2006, Walker again examined CASTANEDA and noted that the "lesion on his penis was draining clear, foul malodorous smell, cultures before were negative for growth, negative RPR, negative HIV, foreskin bleeding at this time, and patient states his colon feels swollen, previous rectal exam showed slightly swollen prostate, deferred today." The assessment at that time was still "unknown etiology of penile lesion."

56. On July 12, 2006, Walker also authored another late entry progress note. The note stated that CASTANEDA "was not denied any treatment by Dr. Hui, although there was no active Treatment Authorization Request (TAR) placed for approval by DIHS headquarters in Washington, DC, nor was there an emergent need."

57. A TAR form was submitted on July 13, 2006, seeking emergency room evaluation and treatment for CASTANEDA, despite the fact that Walker documented that there was no emergent need to treat CASTANEDA the day before. There is no documentation explaining why the GOVERNMENT did not schedule him for the circumcision and biopsy that was ordered by Dr. Wilkinson the previous month and Walker approximately three months prior.

58. However, the TAR form documented that ICE officials spoke with Dr. Wilkinson and Dr. Masters, who: "both strongly recommended admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant, with return follow-up with oncology depending upon findings, and potential treatment or surgery of any malignant findings."

59. The TAR form also documented that CASTANEDA's penis was bleeding, had drainage, malodorous smell and the "lesion now appears to be 'exploding' for lack of better words, definitely macerated." The request for inpatient urology and oncology evaluation and treatment was approved.

60. The GOVERNMENT failed to arrange for this evaluation with the treating doctors that were familiar with CASTANEDA's condition, Dr. Wilkinson and/or Dr. Masters. Instead, ICE brought CASTANEDA to the emergency room at Scripps Mercy Chula Vista on July 13, 2006. This ultimately delayed CASTANEDA's treatment further. CASTANEDA was examined at the Scripps emergency room by Juan Tovar, M.D., who noted a 1.5 cm. by 2 cm. fungating lesion on his penis with discharge but no lymphadenopathy, and made arrangements for CASTANEDA's admission to the hospital. His impression was: "penile mass, rule out cancer, versus infectious etiology."

61. HUNTING, a Scripps urologist, performed a very brief examination of CASTANEDA on July 13, 2006. He did not obtain CASTANEDA's prior family history of cancer and believed CASTANEDA's lesion was "probably condyloma" (genital warts). HUNTING referred CASTANEDA back to his "primary treating urologist" (Dr. Masters), rather than admit him to the hospital on an emergent basis. As a result, a circumcision and biopsy were not performed at Scripps to rule out cancer.

62. On July 17, 2006, Walker again examined CASTANEDA, noting that the penile lesion had grown and he had severe phimosis, bleeding, drainage and foul odor. Walker documented that he spoke to Dr. Wilkinson and Dr. Masters, who both strongly recommended a circumcision and biopsy. He also documented that he spoke to a charge nurse at Scripps who stated that the urologist diagnosed

condyloma acuminate (genital warts), "no need for biopsy but will need a resection of the penis due to severe phimosis and gross condyloma."

63. Walker submitted CASTANEDA for early release on July 18, 2006 to further CASTANEDA's opportunities for testing and potential treatment, due to the Scripps emergency room's failure to perform testing. The GOVERNMENT apparently denied this request and CASTANEDA was not released at that time.

64. On July 26, 2006, David Lusche ("Lusche"), a Physician's Assistant at SDCF, documented that he explained to CASTANEDA "that while a surgical procedure might be recommended long-term, that does not imply that the federal Government is obligated to provide that surgery if the condition is not threatening to life, limb or eyesight." He also noted that his interaction with CASTANEDA "was conversational and calm, not confrontational."

65. On July 28, 2006, CASTANEDA filed a grievance against Lusche. That grievance was also denied. Lusche completed the Grievance Officer's Report and wrote: "I have met with Mr. Castaneda and explained that the urologist informed us that surgery at this point is elective in nature. As such the federal Government will not approve this (elective) surgery. We will continue to monitor Mr. Castaneda's status at his request using the sick call system."

66. On August 9, 2006, CASTANEDA was again examined by Lusche. Lusche noted that

CASTANEDA's foreskin was inflamed and that there was a whitish growth approximately 8 mm. in diameter noted at the inferior margin of the foreskin. Lusche again denied CASTANEDA's request for surgery as elective. He documented that CASTANEDA "expressed understanding, but calmly stated he does not agree with the decision."

67. On August 10, 2006, CASTANEDA again requested a biopsy via sick call slip. On August 11, 2006, Walker submitted a TAR form requesting "biopsy lesion on penis, surgical correction of glans penis, circumcision, by Dr. Robert Masters."

68. On August 22, 2006, almost five months after Walker's recommendation for a urology consult, CASTANEDA was taken to see Dr. Masters. Dr. Masters observed the lesion and concluded that CASTANEDA had genital warts and might have urethral condylomata (i.e., genital warts inside of his urethra). Dr. Masters determined that CASTANEDA was in need of a circumcision, which would relieve the "ongoing medical side effects of the lesion including infection and bleeding" and would provide a biopsy for further analysis.

69. Dr. Masters' report to Walker stated: "We will arrange for admission for circumcision at a local hospital. My principal hospital is Sharp Memorial."

70. The GOVERNMENT denied CASTANEDA treatment and he was never brought to the hospital for biopsy and circumcision pursuant to Dr. Masters' order. Walker documented his conversation with Dr.

Masters on August 22, 2006. Walker characterized Dr. Masters as stating that the "elective procedures this patient may need in the future are cytoscopy and circumcision." Walker did not document Dr. Masters' conclusion that cancer needed to be ruled out via biopsy and his offer to admit CASTANEDA for treatment at Sharp Memorial Hospital. Despite Walker's continued use of the term "elective," that word does not appear anywhere in the reports of Dr. Masters or Dr. Wilkinson, the only specialist physicians who had documented that they had performed a full examination of CASTANEDA.

71. On August 24, 2006, Walker told CASTANEDA that "according to policy," the GOVERNMENT would prevent him from having a circumcision with a cystoscopy because it was "elective." Again, Walker documented that release for medical reasons would be discussed with the medical team so that CASTANEDA could pursue treatment, surgery, and follow up. Nevertheless, the GOVERNMENT did nothing to treat the problem and did not permit CASTANEDA to seek treatment on his own.

72. On August 26, 2006, CASTANEDA was seen by medical staff because of "complaints of a stressful situation regarding his medical status, being unable to sleep at night as ICE won't allow surgical operation for the lesion on penis." He was then prescribed Diphenhydramine, an antihistamine.

73. On August 28, 2006, CASTANEDA again requested treatment at sick call because he had

stress and could not sleep. He attributed the stress to the chronic medical problems which the GOVERNMENT refused to correct. He was prescribed Trazodone, a psychoactive compound with sedative and anti-depressant properties, and a psychology consult, which he apparently never received. GOVERNMENT doctors were apparently indifferent to one of the well known side effects of Trazodone: priapism, a prolonged and painful erection in males.

74. On August 30, 2006, CASTANEDA received a memo from GONSALVES, the Health Services Administrator at SDCF. The memo informed CASTANEDA that "the off site specialist you were referred to for your medical condition reports that any surgical intervention for the condition would be elective in nature. An independent review by our medical team is in agreement with the physician's assessment. The care you are currently receiving is necessary, appropriate and in accordance with our policies."

75. This conclusion is directly contradicted by Dr. Wilkinson and Dr. Masters' reports and by the GOVERNMENT'S TAR forms that specifically documented the off-site specialists' recommendations for surgical intervention and diagnostic biopsy.

76. On September 8, 2006, CASTANEDA was seen by Joanne Galano, RN, who received a sick call request stating, "I have a lot (sic) pain and I'm having discharge." She noted that 800 mg. of Ibuprofen was having no effect on his pain, he was having white

discharge at night, and that "It's getting worse. It's like genital warts, but they're getting bigger."

77. On September 12, 2006, CASTANEDA stated again, via a sick call request, that he was having more penile lesion discharge and discomfort.

78. On September 14, 2006, Cindy Butler, RN, documented that CASTANEDA complained that: "My situation is getting worst and worst! I'm suffering pain, I cannot sleep because of the pain. Also the discharge does not stop nor the bleeding. It smells really bad! States that the antibiotic prescribed two days ago is not effective now, nor has it ever been in the past." The GOVERNMENT still did nothing to treat the problem.

79. On September 18, 2006, the GOVERNMENT denied CASTANEDA's request to be prescribed amoxicillin.

80. On September 26, 2006, Walker examined CASTANEDA's penis and noted "another condyloma type lesion is forming and foul odor emitting from uncircumcised area with mushroomed wart." Apparently, Walker discussed releasing CASTANEDA to obtain medical care, but ICE denied this request because CASTANEDA was a "mandatory hold due to legal status."

81. On October 17, 2006, the medical staff was informed by the detention center's personnel that CASTANEDA was bleeding from his penis and had blood on his underwear.

82. On October 23, 2006, Walker submitted a TAR for surgery, which was pending. On October 25, 2006, the TAR was denied because a DIHS Staff Physician stated that "circumcisions are not a *covered benefit*."

83. The October 25 TAR form erroneously stated that "Patient has been seen by local urologist and oncologist and both are not impressed of possible cancerous lesions, however, there is an elective component to having the circumcision completed." This conclusion contradicted the July 13, 2006 TAR form, which documented that Dr. Wilkinson, the oncologist, and Dr. Masters, the urologist, both "strongly recommended . . . surgical intervention via biopsy/exploration" to rule out cancer. This conclusion is also contradicted by the doctors' reports.

84. The October 25 TAR form also documented that ICE authorities denied CASTANEDA's request for release to seek medical care. It stated that CASTANEDA "is not able to be released to seek further care due to mandatory hold and according to ICE authorities, may be with this facility for quite a while." This document shows that high-ranking GOVERNMENT authorities were *aware* CASTANEDA needed treatment and knew he would be unable to receive it in the foreseeable future.

85. On or about October 29, 2006, Walker told CASTANEDA that multiple requests to Washington, D.C. seeking authorization for surgery had been denied.

86. On November 9, 2006, Cindy Butler, RN, documented that CASTANEDA's "symptoms have worsened. States he feels a constant pinching pain, especially at night. States he constantly has blood and discharge on his shorts. . . . Also complains of a swollen rectum which he states make bowel movements hard." In response to these complaints, he was prescribed milk of magnesia and docusate sodium, a laxative. CASTANEDA was informed that the TAR was "in place for surgery and is pending approval," despite the fact that the TAR was denied two weeks before.

87. On November 14, 2006, CASTANEDA was seen by Lusche, who documented that CASTANEDA complained of a new, second lesion on the underside of his penis and he requested assistance to obtain more fresh underwear.

88. On November 15, 2006, the medical records document that the penile lesion was growing and that CASTANEDA could not stand and urinate because the urine "sprays everywhere." Lusche's examination documented a genital wart that was white in color and moist in appearance, approximately 2.5 cm. in diameter, and noted light pink stains in CASTANEDA's underwear. Lusche treated this condition by making a request for seven pairs of clean boxer shorts weekly.

89. CASTANEDA was transferred from SDCF on November 17, 2006. The "Medical Summary of Federal Prisoner/Alien in Transit" sheet, signed by

Cindy Butler, listed no "current medical problems" and listed Trazodone as the only prescribed medication, with no medication for pain or antibiotics.

90. On November 23, 2006, CASTANEDA was examined at the LA/Santa Ana Staging area and was noted to have "other penile anomalies."

91. CASTANEDA was booked into San Pedro on November 24, 2006. On information and belief, CASTANEDA's medical records were transferred with him and were provided to medical personnel at San Pedro.

92. On or about December 1, 2006, CASTANEDA filed a sick call slip at San Pedro complaining of pain, bleeding and discharge from his penis.

93. On or about December 3, 2006, CASTANEDA filed two more sick call slips complaining about his continuing pain, bleeding and discharge. CASTANEDA also requested a clean set of blankets because he had soiled his original sheets with blood and discharge from his penis.

94. ACLU National Prison Project ("ACLU") attorneys became involved in CASTANEDA's case on or about December 5, 2006. The ACLU sent a letter to multiple SDCF and Health Services Administration ("HSA") officials, recounting CASTANEDA's medical history since entering ICE custody. The letter fully informed these officials of the situation, including that "Mr. Castaneda, who has a strong family history of cancer, legitimately fears that his long term health

is being jeopardized by the lack of appropriate medical care he continues to receive in ICE custody. In the short term, Mr. Castaneda continues to experience severe pain, bleeding, and discharge." Among other requests, the letter asked for confirmation that arrangements had been made to appropriately treat CASTANEDA.

95. It appears that a TAR form was filed sometime on or about December 5, 2006, seeking a second professional opinion and follow up due to the degree of phimosis and hypospadia, stating "he should have a biopsy of this lesion as well to ensure its status."

96. The TAR was approved on December 5, 2006 for "urology consult only. Please submit treatment plan and clinical assessment if other care recommended." The TAR request sought a consultation with Lawrence S. Greenberg, M.D., because of a "history of severe HPV infection causing large, painful, penile warts, has bleeding and pain from the lesions. May also have an underlying structural deformity of penis."

97. As a result of the ACLU's advocacy, CASTANEDA was transported to the office of Dr. Greenberg on December 14, 2006. Dr. Greenberg reviewed CASTANEDA's medical records, which were provided to him by an ICE officer, and then physically examined CASTANEDA's penis. Dr. Greenberg noted the blood and discharge and asked why CASTANEDA had not had surgery.

98. Dr. Greenberg informed CASTANEDA that he required a circumcision and remarked that CASTANEDA's penis was a "mess." At the end of the visit, Dr. Greenberg stated that CASTANEDA required surgery and that he would send a fax recommendation to the doctor at San Pedro later that day.

99. When CASTANEDA left Dr. Greenberg's office, he was transported back to San Pedro and was told that he would be seen by the medical staff either on December 15 or December 18.

100. CASTANEDA was not seen by the medical staff on either December 15 or 18, despite filing a sick call slip on December 18 that reported a lump that had developed in his groin over the weekend.

101. On December 19, an ACLU attorney telephoned various officials regarding CASTANEDA's medical care and re-sent the ACLU's December 5 letter via e-mail to the Officer-in-Charge at that time. The Officer-in-Charge replied to the e-mail, stating: "I am in receipt of your request. I am currently dealing with a couple serious issues this date. I will however, consult with the affected departments tomorrow and see what can be done concerning your request."

102. On December 26, 2006, Shelly Hollandsworth, RN, documented CASTANEDA's complaint of blood coming from his penis. Although ICE had received Dr. Greenberg's report by December 15, Nurse Hollandsworth had no knowledge of the report. CASTANEDA was provided no treatment, despite Dr.

Greenberg's report, the e-mail from the ACLU and CASTANEDA's disturbing medical presentation, which included a lump in his groin.

103. On January 11, 2007, CASTANEDA was again seen by Nurse Hollandsworth, who still reported a "knowledge deficit related to follow up." Danielle Didonna also authored a note on January 11, stating that CASTANEDA had been seen by Dr. Greenberg "who recommends advanced urology specialty care. Patient must have a biopsy and further treatment recommendations made." She also documented that CASTANEDA was in severe pain that was not being alleviated by pain medication. She documented that CASTANEDA was to have another specialty evaluation with a biopsy. The assessment was to rule out carcinoma of penis secondary to HPV infection.

104. On January 19, 2007, the ACLU faxed another letter and request for medical treatment on CASTANEDA's behalf to MOLINAR, Norma Bouales-Garibei, HENNEFORD, and MAZUR.

105. On January 24, 2007, forty days after Dr. Greenberg's surgical consult order, the records reflect that a TAR form requesting a specialty urology consult with Asghar Askari, M.D. was verbally approved by Dr. Collins, presumably an ICE doctor.

106. On January 25, 2007, CASTANEDA was seen by Dr. Askari, who diagnosed a fungating penile lesion with possible left lymphadenopathy that was "most likely penile cancer." He ordered a penile

biopsy on an out-patient basis under general anesthesia. He communicated these findings to the GOVERNMENT.

107. On January 29, 2007, the ACLU again wrote to ICE officials, urging them to provide CASTANEDA the care that had been ordered for him for the past ten months. A biopsy was finally scheduled for CASTANEDA in February.

108. Instead of providing the treatment ordered by Dr. Askari, ICE released CASTANEDA from custody on February 5, 2007. ICE released CASTANEDA to avoid having to pay for the biopsy that was originally recommended by Walker on CASTANEDA's second day of admission in March 2006, by Dr. Wilkinson on June 7, 2006, by Dr. Masters on August 22, 2006, and by Dr. Greenberg on December 14, 2006. The GOVERNMENT ultimately released CASTANEDA without ever providing the simple and inexpensive procedure essential to diagnosing a serious and life-threatening medical problem.

109. After his release from ICE custody, CASTANEDA went to the emergency room of Harbor-UCLA Hospital in Los Angeles ("Harbor-UCLA") on February 8, 2007. He was scheduled for a biopsy in the Urology Clinic on February 12, 2007, and was admitted on February 13 with a diagnosis of squamous cell carcinoma of the penis.

110. CASTANEDA's penis was amputated on February 14, 2007, Valentine's Day.

111. The partial penectomy left CASTANEDA with a 2 cm. stump. The remaining 8 cm sample of his penis was sent to pathology, which revealed that CASTANEDA had "Invasive Squamous Cell Carcinoma (5.5 cm in size), keratinizing type." The tumor extended 4.5 cm. in depth.

112. Harbor-UCLA diagnosed CASTANEDA with metastatic penile cancer that had spread throughout his body.

113. CASTANEDA underwent chemotherapy in 2007 at Harbor-UCLA and was diagnosed with terminal cancer. He died of cancer on February 16, 2008.

114. The UNITED STATES and its agents/employees provide care based on a DIHS Detainee Covered Services Package providing, in pertinent part: "The DIHS Medical Dental Detainee Covered Services Package primarily provides health care services for emergency care. Emergency care is defined as 'a condition that is threatening to life, limb, hearing, or sight.' Accidental or traumatic injuries incurred while in the custody of ICE or BP and acute illnesses will be reviewed for appropriate care. Other medical conditions which the physician believes, if left untreated during the period of ICE/BP custody, would cause deterioration of the detainee's health or uncontrolled suffering *affecting his/her deportation status* will be assessed and evaluated for care. All health care services for which a claim for payment is submitted to DIHS require authorization.

Elective, non-emergent care requires prior authorization. DIHS must be notified of emergency care services within 24 business hours of occurrence. Requests for pre-existing, non-life threatening conditions, will be reviewed on a case by case basis. All medical service requests should have correlating clinical signs and symptoms."

115. The DIHS policy differs from the medical policies that govern convicted criminals in the custody of the United States Department of Justice, Federal Bureau of Prisons. Convicted criminals are not faced with the presumption that their "pre-existing" or "non-emergent" medical needs will not be treated. They are also treated irrespective of their "deportation status." Unlike immigration detainees, they are not automatically denied care for conditions that are not considered an "emergency." Unlike immigration detainees, they do not need to obtain prior approval to obtain medical treatment for "urgent conditions."

116. The DIHS policy was promulgated by high-ranking DIHS officials, including, but not limited to, MIGLIACCIO and SHACK, who were aware or should have been aware that the policy violates the United States Constitution. CHERTOFF, as the final policy maker for DHS, approved, ratified, and/or promulgated the policy.

117. DIHS's medical definition of "elective" is: "any procedure that we have time to submit a TAR and allow for approval . . . in the sense that it is not

an emergency that they will die now." In other words, any medical condition where death is not immediately imminent is elective. This view of "elective" does not mean that the procedure is not medically necessary.

118. The UNITED STATES had an inadequate and deficient process for hiring/retaining, training, and supervising medical care providers such that, at SDCF, Physician Assistants ("PA") made the medical decisions that a licensed medical doctor should make, including diagnosing conditions and creating a treatment plan.

119. There were no DIHS policies, guidelines, or procedures to determine when patients should be seen by a PA, rather than a physician, based on the severity of a patient's medical condition.

120. HUI did not have sufficient training and/or experience as a physician to manage the medical care required for a 1,000 bed facility like SDCF and was the only physician providing medical care there after May or June 2006, during the time relevant to this lawsuit.

121. HUI was never provided any written guidelines, rules, instruction, or advice on how to interpret the policy regarding treatment based on deportation status.

122. SDCF did not employ any tickler or alert system at DIHS that would notify physicians about

particular patients with serious medical conditions that needed monitoring.

123. At SDCF, there was no policy, procedure, or arrangement with outside providers to make sure that detainees received timely specialist care when needed. In fact, some outside providers refused to treat ICE detainees because the UNITED STATES failed to pay them for the services rendered.

124. HUI did not authorize CASTANEDA's hospital admission for a biopsy on June 7 because she needed a specific approval for a patient to be admitted in a non-emergent situation. HUI felt constrained by DIHS's policies for providing medical care to detainees, which specifically state that only emergencies are treated without authorization. If the policy did not exist, there was no medical reason for HUI to tell Dr. Wilkinson not to perform CASTANEDA's biopsy on June 7.

125. The specific failures of the individual Public Health Service ("PHS") Defendants (HENNEFORD, MIGLIACCIO, SHACK, HUI, and GONSALVES) and the UNITED STATES were committed in the context of a broader custom, policy, or practice established by the UNITED STATES that resulted in providing constitutionally inadequate medical care to detainees. The examples set forth below establish that the UNITED STATES, DHS, ICE, DIHS, CHERTOFF, and the PHS Defendants knew that they were providing inadequate care to detainees, but continued to do so, and sometimes tried to cover up

their inadequate practices by destroying and/or altering official government records.

126. For example, while the number of detainees in ICE custody has tripled since 2001, the DIHS budget has only increased by 65%, resulting in inadequate resources to provide necessary medical care to detainees.

127. It has been well documented by DIHS physicians that preventable deaths and significant injuries have occurred on a regular basis due to incompetence and/or inadequate resources. These concerns by DIHS physicians were communicated up the chain of command to the final policy makers for the provision of medical care to immigration detainees.

128. Approximately 83 detainees have died in, or soon after, custody during the past five years. The deaths are the loudest alarms about a system teetering on collapse. Actions taken – or not taken – by medical staff members may have contributed to 30 of those deaths, according to confidential internal reviews and the opinions of medical experts who reviewed some files for *The Washington Post*.

129. According to an analysis by The Washington Post, most of the people who died in custody were young. Thirty-two of the detainees were younger than 40, and only six were 70 or older. The deaths took place at dozens of sites across the country.

130. Instead of recognizing that detainees were receiving inadequate medical care and seeking to improve it, the UNITED STATES had a custom, policy, or practice whereby high-ranking government officials covered up and ratified constitutionally inadequate care.

131. For example, in July 2006, Lusche, a PA at SDCF (also known as the "Otay Mesa" facility), where CASTANEDA was held, realized that CASTANEDA's grievances were still pending and that an audit of the compound's medical files was approaching. At 2:26 a.m. on July 28, he e-mailed a colleague, asking him to retrieve a handwritten grievance from CASTANEDA that Lusche had left in a drawer in an examining room

132. "We need to write something different, or make some amendment, on the Grievance for Francisco Castaneda," Lusche wrote. "Your response starts, 'Grievance not resolved.' Those words are going to attract all kinds of attention during an ICE Jail Standards audit. . . . Could you somehow 'patch up' that Grievance with an amendment then put it in my box. I just want to avoid problems when the Auditors show up."

133. Walker, a PA at SDCF, responded the next morning at 10:10 a.m.: "But it is true, unfortunately, this is a case where his grievance is correct and I don't blame the detainee."

134. SHACK, the DIHS Medical Director, ratified the Defendants' conduct toward CASTANEDA

by stating: "I looked over about 200 pages of medical records for this case. In my opinion, the care provided to this detainee was, and is, timely and appropriate." He also described the care CASTANEDA received as "good care." By contrast, the UNITED STATES has now admitted in this litigation that its negligence caused CASTANEDA's penis amputation and death.

135. ICE officials told congressional staffers in October 2007 that the facility at San Pedro was closed to renovate the fire-suppression system and replace the hot-water boiler. But internal documents and interviews reveal unsafe conditions that forced the agency to relocate all 404 detainees that month. An audit found 53 incidents of medication errors.

136. Internal ICE and DIHS documents show that high-ranking final policy makers know that the system for providing medical care is inadequate and that piecemeal fixes are not enough.

137. "The onus is on us if it hits the fan," one federal official complained during a high-level headquarters meeting about staff shortages late last summer, according to records of the conversation. "We're going to be responsible if something happens, because it's well documented that we know there's a problem, that the problem is severe."

138. "We are putting ourselves and our patients at risk," another federal official said.

139. Doctors employed by the UNITED STATES have expressed concerns about violating medical ethics and fear lawsuits. HUI sent a memo to DIHS medical director SHACK, saying her colleagues were worried that they might be sued because of the substandard care they were giving detainees. The agency's mission of "keeping the detainee medically ready for deportation" often conflicts with the standards of care in the wider medical community, HUI wrote. "I know in my gut that I am exposing myself to the US legal standard of care argument. . . . Do we need to get personal liability insurance?"

140. Nurses who work on the front lines see the problems up close. "Dogs get better care in the dog pound," said Catherine Rouse, a contract nurse at an Arizona detention center who quit after two months last year because she saw what she regarded as "scary medicine" in the prison, including patients being taken off medications they needed and nurses performing tasks they were not qualified to perform. "You don't treat people like that. There has to be some kind of moral fiber," Rouse said.

141. Neil Sampson, who ran the DIHS as interim director during most of 2007, left that job with serious questions about the GOVERNMENT's commitment to providing medical care for detainees. Sampson said that ICE treated detainee health care "as an afterthought," reflecting what he called a failure of leadership and management at DHS. "They do not have a clear idea or philosophy of their approach to health care [for

detainees]," he said. "It's a system failure, not a failure of individuals."

142. A new director for health services arrived at DIHS six months ago, following a stretch when the agency was run first by Sampson and then by a second interim director. The new director is LaMont W. Flanagan, who brought with him the credential of having been fired in 2003 by the state of Maryland for bad management and poor spending practices supervising detention and pretrial services. An audit found that Flanagan had signed off on payments of $145,000 for employee entertainment and other ill-advised expenditures. His reputation was such that the District of Columbia would not hire him for a juvenile-justice position.

143. A shortage of doctors and nurses is commonplace at detention centers across the country. Records from February 2008 show that about 30 percent of all DIHS positions in the field were unfilled. Concern about the vacancies is voiced repeatedly at clinical directors' meetings. "How do we state our concerns so that we can be heard? . . . . [T]his is a CRITICAL condition. . . . We have bitten off more than we can chew," a physician wrote in the minutes of one meeting last summer.

144. In some prisons, the staffing shortages are acute. The Willacy County detention center in South Texas – the largest compound in the United States, with 2,018 detainees – has no clinical director, no pharmacist and only a part-time psychiatrist.

Likewise, nearly 50 percent of the nursing positions were unfilled at the 1,500-detainee Eloy, Arizona prison in February 2008. At the newly opened 744-bed Jena., Louisiana compound, medical care for detainees is administered entirely by nurses; the facility has no clinical director, no staff physician, no psychiatrist and no professional dental staff.

145. In August 2007, Sampson, who was then DIHS interim director, warned his superiors at ICE that critical personnel shortages were making it impossible to staff the Jena facility adequately. In a vociferous e-mail to Gary Mead, the ICE deputy director in charge of detention centers, Sampson wrote:

146. "With the Jena request we have been re-examining our capabilities to meet health care needs at a new site when we are facing critical staffing shortages at most every other DIHS site. While we developed, executed and achieved major successes in our recruitment efforts we have been unable to meet the demand."

147. The slow ICE security-clearance process forced many job applicants to go elsewhere, Sampson wrote. Of the 312 people who applied for new positions over the past year, 200 withdrew, he wrote, because they found other jobs during the 250 days it took ICE, on average, to conduct the required background investigations. In May 2008, ICE officials said the average wait had decreased recently to 37 days.

148. These shortages have burdened the remaining staff. In July 2007, a year after a detainee's

death in Otay Mesa, HUI strongly complained to headquarters about workload stress. "The level of burnout . . . is high and rising," she wrote in an e-mail. "I know that I have been averaging approximately 2-6 hrs of overtime daily for the past 2 months. I will no longer be able to sustain this pace and will be decreasing the number of hours that I work overtime. This being said, more will be left undone because we simply do NOT have the staff."

149. In one 2007 detainee death, memos and confidential notes show how medical staff missed an infectious disease (meningitis) in their midst. Victor Alfonso Arellano, 23, a transgender Mexican detainee with AIDS, died in custody at San Pedro. The last page of the internal review of Arrellano's death, under the heading "Off the record observations and recommendations," states: "The clinical staff at all levels fails to recognize early signs and symptoms of meningitis. . . . Pt was evaluated multiple times and an effort to rule out those infections was not even mentioned."

150. Delays persist throughout the system. In January 2008, the detention center in Pearsall, Texas, an hour from San Antonio, had a backlog of 2,097 appointments.

151. Luis Dubegel-Paez, a 60-year-old Cuban, had filled out many sick call requests before he died. Detained at the Rolling Plains Detention Facility in the West Texas town of Haskell, he wrote on New Year's Day: "need to see doctor for Heart medication;

and having chest pains for the past three days. Can't stand pain."

152. Ten days later Dubegel-Paez went to the clinic and became upset when he wasn't seen. He slugged the window, yelled, pointed at his wristwatch. He was escorted back to his cell.

153. Another of Dubegel-Paez's sick call requests said: "Need to see a doctor. I have a lot of symptoms of sickness . . . as soon as possible!" The next was more urgent: "I have a emergency to see the doctor about my heart problems . . . for the last couple days and I been getting dizzy a lot."

154. The next day, Dubegel-Paez collapsed and died. His medical records do not show that he ever saw a doctor for his chest pains.

155. Hanna Boutros, 52, who came to the United States 30 years ago, waited seven months for surgery after receiving a diagnosis of "high-grade" prostate cancer, which his urologist urged be treated immediately. ICE officials sent him to Krome Service Processing Center in Miami because, they said, it could best deal with his condition.

156. At Krome, however, Boutros was seen by nurses, not a doctor, until he found an outside lawyer to threaten a suit. Boutros finally got surgery just before Christmas, before he was deported to Lebanon, leaving two children and a wife in the United States. "I was miserable. I was very, very scared. It was always burning," he said.

157. DIHS operates with a top priority of limiting care and saving money. Its medical mission is only to keep people healthy enough to be deported.

158. One DIHS chart, covering October 2005 to September 2006, is labeled "TAR Cost Savings Based on Denials. The chart shows that DIHS saved $129,713 by denying 17 medical requests for people with HIV. $36,216 by denying seven requests for people with various forms of psychosis, $91,926 by denying 27 requests for people with chest pain and $9,545 by denying treatment for a case of blood in stool.

159. Managed Care technicians routinely withhold treatment for many types of care, in an attempt to save money. For mental health services, four denials for treatment of manic-depressive psychosis saved DIHS $18,145.36, according to an itemized record of the savings over a one-year period ending in August 2006. Two denials for care of "unspecified psychosis" saved an estimated $11,668.60. Nine denials for treatment of "depressive disorder not elsewhere classified" saved $43,158.57.

160. The supervisor of the managed-care nurses who decide on treatment requests sent a note once to a senior official about a 33-year-old detainee seen at a Nashville hospital for a recurrence of sarcoma. "The process of re-diagnosis and treatment will be extensive and costly," that nurse wrote. She said she seconded the idea of releasing the detainee so the government would not have to pay for his care.

161. These sorts of machinations prompted the deputy warden at York County Prison in Pennsylvania, which houses many immigrant detainees, to write a letter about the health services division. "[I]n my opinion, they have set up an elaborate system that is primarily interested in delaying and/or denying medical care to detainees," the warden, Roger Thomas, wrote in late 2005. "There is nothing easy about working with DIHS. If something can be delayed, it is delayed. If it can be denied, it is denied. If it can be difficult, it is made difficult. Most importantly, if there is some bureaucratic procedure that will delay/deny treatment to a detainee . . . you can be assured that DIHS will do it."

162. An Officer-In-Charge at an ICE facility e-mailed up the chain of command. "I believe this case illustrates that we need something more efficient," he wrote. "If we need more medical staff, then they need to be deployed, but regardless of what the solution is, it needs to occur rather quickly, as access to adequate medical care for our detainees is a rather critical issue."

FIRST CAUSE OF ACTION
FTCA Claim against UNITED STATES for Medical Negligence
(WRONGFUL DEATH AND SURVIVAL ACTION)
(Non-Jury Claim)

163.. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

164. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the FTCA, 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

165. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

166. At all material times, the UNITED STATES carelessly and negligently cared for and treated CASTANEDA while he was detained at SDCF and San Pedro, and provided medical care in a careless and negligent manner and also acted with deliberate indifference to CASTANEDA's known serious medical condition. The UNITED STATES carelessly and negligently treated, managed, monitored and supervised CASTANEDA's condition during his detention from March 27, 2006 until February 5, 2007. The UNITED STATES' negligent care and negligent failure to administer appropriate care directly and proximately resulted in certain injury and disability to CASTANEDA, all to his general damage.

167. As a direct and proximate result of the UNITED STATES' negligence, CASTANEDA suffered

certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

168. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to PLAINTIFFS.

SECOND CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Establishment of Unconstitutional Policy for Provision of Medical Care to Immigration Detainees (WRONGFUL DEATH AND SURVIVAL ACTION) (Non-Jury Claim)

169. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

170. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the FTCA, 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

171. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

172. At all material times, the UNITED STATES failed to use reasonable care in the establishment of policies and directives for the provision of medical care to immigration detainees. The policies are embodied, in part, in a Managed Care plan for immigration detainees referred to as the DIHS Detainee Covered Services Package. ("Covered Services Package"). The policies and directives for the provision of medical care were unreasonable and inadequate in part because these policies violated clearly established constitutional law.

173. As a direct and proximate result of the UNITED STATES' negligence in creating and establishing these inadequate policies and directives, CASTANEDA suffered certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

174. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals,

doctors, and other medical care and treatment in an amount not now known to PLAINTIFFS.

THIRD CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Application of Policy for Provision of Medical Care to Immigration Detainees (WRONGFUL DEATH AND SURVIVAL ACTION) (Non-Jury Claim)

175. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

176. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violate the FTCA, 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

177. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

178. At all material times, the UNITED STATES carelessly and negligently implemented and/or applied the ICE detainee medical care policy, including the

Benefits Package, such that the CASTANEDA's request for a diagnostic biopsy, a simple and inexpensive procedure to rule out a life threatening disease, was denied as "elective." In addition to qualifying as negligence, the UNITED STATES' action violated CASTANEDA's constitutional right to adequate and reasonable medical care.

179. As a direct and proximate result of the UNITED STATES' negligence, CASTANEDA suffered certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

180. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to PLAINTIFFS.

FOURTH CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Hiring/Retention (WRONGFUL DEATH AND SURVIVAL ACTION) (Non-Jury Claim)

181. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

182. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violate the FTCA, 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

183. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

184. At all material times, the UNITED STATES carelessly and negligently hired and retained medical health care providers who did not have the experience and qualifications necessary to provide adequate medical care to immigration detainees, including CASTANEDA. The UNITED STATES knew or should have known that the providers taking care of CASTANEDA were not qualified to make the medical determinations necessary for his care.

185. As a direct and proximate result of the UNITED STATES' negligence, CASTANEDA suffered certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

186. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to PLAINTIFFS.

FIFTH CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Supervision (WRONGFUL DEATH AND SURVIVAL ACTION) (Non-Jury Claim)

187. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

188. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violate the FTCA, 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

189. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

190. At all material times, the UNITED STATES carelessly and negligently supervised its medical health care providers, including physicians, mid-level providers, and nurses. Physicians, including HUI, did not adequately supervise mid-level providers and nurses, and SHACK did not adequately supervise physicians, including HUI, who did not have the experience and qualifications necessary to provide adequate medical care to immigration detainees, including CASTANEDA.

191. As a direct and proximate result of the UNITED STATES' negligence, CASTANEDA suffered certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

192. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to PLAINTIFFS.

SIXTH CAUSE OF ACTION
FTCA Claim against UNITED STATES for Negligent Training (WRONGFUL DEATH AND SURVIVAL ACTION) (Non-Jury Claim)

193. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

194. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violate the FTCA, 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

195. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

196. At all material times, the UNITED STATES carelessly and negligently trained its medical health care providers, including physicians, mid-level providers, and nurses. Physicians, including HUI, did not adequately train mid-level providers and nurses and SHACK did not adequately train physicians, including HUI, who did not have the experience and qualifications necessary to provide adequate medical care to immigration detainees, including CASTANEDA.

197. As a direct and proximate result of the UNITED STATES' negligence, CASTANEDA suffered certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

198. As a further direct and proximate result of the negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to PLAINTIFFS.

SEVENTH CAUSE OF ACTION
FTCA Claim against UNITED STATES for Intentional Infliction of Emotional Distress (SURVIVAL ACTION) (Non-Jury Claim)

199. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

200. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the FTCA, 28 U.S.C. § 2674. This action is brought under the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

201. All conditions precedent to this lawsuit have been performed or have occurred, including

providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

202. At all material times, the UNITED STATES' treatment of CASTANEDA during his detention, including but not limited to the failure to provide him reasonable and humane medical care, was conducted in an extreme and outrageous manner with the knowledge that CASTANEDA was unable to care for himself during his incarceration.

203. The UNITED STATES acted intentionally or with the reckless disregard of causing emotional distress.

204. As a direct and proximate result of the unlawful conduct of the UNITED STATES and its agents, CASTANEDA has suffered special damages, including but not limited to past and future loss of income, benefits, medical expenses, and other damages to be proven at the time of trial.

205. As a direct and proximate result of the unlawful conduct of the UNITED STATES and its agents, CASTANEDA has suffered general damages, including but not limited to shock, embarrassment, physical distress and injury, humiliation, severe emotional distress, stress and other damages to be proven at the time of trial.

206. PLAINTIFFS are informed and believe, and thereon allege, that the UNITED STATES and its agents committed the acts herein alleged maliciously, fraudulently and oppressively in conscious disregard for CASTANEDA's rights and that the conduct of UNITED STATES and its agents was a substantial factor in causing CASTANEDA's emotional distress.

EIGHTH CAUSE OF ACTION
FTCA Claim against UNITED STATES for Intentional and/or Negligent Failure to Summon Medical Care for Detainee in Immediate Need of Care (WRONGFUL DEATH AND SURVIVAL ACTION) (Non-Jury Claim)

207. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

208. Defendant UNITED STATES' treatment of CASTANEDA while he was detained at SDCF and San Pedro violated the FTCA, 28 U.S.C. § 2674. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

209. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the UNITED STATES pursuant to the FTCA. Six months have elapsed from

the date a pre-suit claim was filed. Therefore, all administrative exhaustion requirements have been met and this claim is ripe.

210. At all material times, the UNITED STATES knew or had reason to know that CASTANEDA was in need of immediate medical care and failed to take reasonable action to summon such medical care. The UNITED STATES' intentional and/or negligent failure to administer appropriate care directly and proximately resulted in certain injury and disability to CASTANEDA, all to his general damage.

211. As a direct and proximate result of the UNITED STATES' failure to summon care, CASTANEDA suffered certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

212. As a further direct and proximate result of the intentional and/or negligent, acts, omissions and conduct of the UNITED STATES and its agents, and the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to PLAINTIFFS.

NINTH CAUSE OF ACTION
***Bivens* Claim for Inadequate Medical Care against all Individual Defendants (except HUNTING) and DOES 1-10 (WRONGFUL DEATH AND SURVIVAL ACTION)**

213. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

214. This is a claim against all Defendants who were agents of the UNITED STATES and named in their individual capacity, excluding HUNTING ("INDIVIDUAL DEFENDANTS"), and DOES 1-10. This action is brought under the California Wrongful Death Statute (CCP § §377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

215. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated CASTANEDA's right to adequate medical care under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution by failing to treat CASTANEDA's known serious medical condition.

216. At all material times, the INDIVIDUAL DEFENDANTS and DOES 1-10 were aware that CASTANEDA had a growth on his penis that required a biopsy to rule out penile cancer, a very serious and life-threatening disease.

217. The INDIVIDUAL DEFENDANTS and DOES 1-10 purposefully denied CASTANEDA essential

medical care for a known serious medical condition, despite knowledge that CASTANEDA's mother had died from cancer at age thirty-nine and that CASTANEDA was not going to be released from custody in the foreseeable future to treat the life-threatening condition.

218. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering "medical care" to CASTANEDA were so far below the acceptable standard that the INDIVIDUAL DEFENDANTS and DOES 1-10 could not have been making a "medical" judgment in their decision to deny CASTANEDA a very basic and inexpensive diagnostic procedure to rule out a life-threatening disease.

219. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny CASTANEDA medical care was not based on a medical reason, but rather economic and/or other constitutionally impermissible reasons unrelated to the provision of medical services.

220. Each of the INDIVIDUAL DEFENDANTS and DOES 1-10 were acting under color of law by exercising power made possible because they were clothed with the authority of federal law.

221. The INDIVIDUAL DEFENDANTS and DOES 1-10 acted with deliberate indifference to the serious health needs protected by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, subjected CASTANEDA to dangerous and debasing conditions of confinement, and violated basic fundamental rights to safe and humane confinement. The inhumane conditions of confinement caused CASTANEDA medical injuries as alleged in this Complaint. The conduct constituted cruel and unusual punishment and a violation of due process.

222. The INDIVIDUAL DEFENDANTS and DOES 1-10 are liable for creating an unconstitutional policy and/or custom for the provision of medical care to detainees.

223. The INDIVIDUAL DEFENDANTS and DOES 1-10 acted with deliberate indifference in hiring/retaining, training, and supervising U.S. employees such that they violated CASTANEDA's constitutional rights.

224. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated clearly established law by failing to adequately treat and/or diagnose a known serious medical condition.

225. As a result of the INDIVIDUAL DEFENDANTS and DOES 1-10's constitutional violations of CASTANEDA's rights, CASTANEDA sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement;

c. Death; and

d. Economic losses consisting of past medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

226. The conduct of each of the INDIVIDUAL DEFENDANTS and DOES 1-10 constituted a reckless or callous disregard of CASTANEDA's constitutional right to adequate medical care, entitling PLAINTIFFS to punitive damages.

TENTH CAUSE OF ACTION
Bivens Claim for Equal Protection Violations against all INDIVIDUAL DEFENDANTS (except HUNTING) and DOES 1-10 (WRONGFUL DEATH AND SURVIVAL ACTION)

227. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

228. This is a claim against the INDIVIDUAL DEFENDANTS and DOES 1-10. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California

Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the Federal common law survival rule.

229. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated CASTANEDA's right to equal protection under the Fifth and Fourteenth Amendments of the United States' Constitution by failing to treat CASTANEDA's known serious medical condition due to his immigration status, without a rational basis to do so.

230. At all material times, the INDIVIDUAL DEFENDANTS and DOES 1-10 were aware that CASTANEDA had a growth on his penis that required a biopsy to rule out penile cancer, a very serious and life-threatening disease.

231. The INDIVIDUAL DEFENDANTS and DOES 1-10 purposefully denied CASTANEDA essential medical care for a known serious medical condition, despite knowledge that CASTANEDA's mother had died from cancer at age thirty-nine and that CASTANEDA was not going to be released from custody in the foreseeable future to treat the life-threatening condition.

232. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering "medical care" to CASTANEDA were so far below the acceptable standard that the INDIVIDUAL DEFENDANTS and DOES 1-10 could not have been making a "medical" judgment in their

decision to deny CASTANEDA a very basic and inexpensive diagnostic procedure to rule out a life-threatening disease.

233. The actions of the INDIVIDUAL DEFENDANTS and DOES 1-10 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny CASTANEDA medical care was not based on a medical reason, but rather economic and/or other constitutionally impermissible reasons unrelated to the provision of medical services.

234. Each of the INDIVIDUAL DEFENDANTS and DOES 1-10 were acting under color of law by exercising power made possible because they were clothed with the authority of federal law.

235. The INDIVIDUAL DEFENDANTS and DOES 1-10 acted in violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments of the United States Constitution by discriminating against CASTANEDA based on his immigration status with no rational basis to do so. In that regard, the INDIVIDUAL DEFENDANTS and DOES 1-10 failed to approve a simple and inexpensive diagnostic procedure for CASTANEDA because he was an immigration detainee, while having a policy to provide this type of care to other federal prisoners who were not in the same class as CASTANEDA.

236. The INDIVIDUAL DEFENDANTS and DOES 1-10 are liable for creating an unconstitutional

policy and/or custom for providing medical care to detainees.

237. The INDIVIDUAL DEFENDANTS and DOES 1-10 acted with deliberate indifference in hiring/retaining, training, and supervising U.S. employees such that they violated CASTANEDA's constitutional rights.

238. The INDIVIDUAL DEFENDANTS and DOES 1-10 violated clearly established law by violating CASTANEDA's rights to equal protection under the United States Constitution.

239. As a result of the INDIVIDUAL DEFENDANTS and DOES 1-10's constitutional violations of CASTANEDA's rights, CASTANEDA sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement;

c. Death; and

d. Economic losses consisting of past medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

240. The conduct of each of the INDIVIDUAL DEFENDANTS and DOES 1-10 constituted a reckless or callous disregard of CASTANEDA's constitutional

right to Equal Protection, entitling PLAINTIFFS to punitive damages.

ELEVENTH CAUSE OF ACTION
42 U.S.C. § 1983 Claim against PASHA, SHERIDAN, LEONG, and DOES 1-10 (WRONGFUL DEATH AND SURVIVAL ACTION)

241. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

242. This claim is brought under 42 U.S.C. § 1983. PASHA, LEONG, SHERIDAN, and DOES 1-10, all employees and/or agents of CALIFORNIA, violated CASTANEDA's right to adequate medical care under the Eighth and Fourteenth Amendments of the United States Constitution by failing to treat CASTANEDA's known serious medical condition. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62), the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30) and/or the federal common law survival rule.

243. Each of these Defendants was acting under color of law by exercising power made possible because they were clothed with the authority of state law. Their actions violated clearly established law.

244. Each of these Defendants acted with deliberate indifference to the serious health needs protected by the Eighth and Fourteenth Amendments to the United States Constitution. They had actual

knowledge that CASTANEDA had a 2 cm. by 2 cm. growth on his penis that required a biopsy to rule out cancer. In spite of this documented knowledge, they denied him the biopsy. This conduct constituted cruel and unusual punishment and a violation of due process.

245. Each of these Defendants violated clearly established law by acting with deliberate indifference in failing to adequately treat and/or diagnose a known serious medical condition.

246. As a result of these Defendants' constitutional violations of CASTANEDA's rights, CASTANEDA sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement;

c. Death; and

d. Economic losses consisting of past medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

247. The conduct of each of these Defendants constituted a reckless or callous disregard of the CASTANEDA's constitutional rights, entitling PLAINTIFFS to punitive damages.

TWELFTH CAUSE OF ACTION
Medical Negligence against PASHA, SHERIDAN, LEONG, and DOES 1-10
(WRONGFUL DEATH AND SURVIVAL ACTION)

248. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

249. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62) and the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30).

250. DOES 1 through 10, inclusive, are sued under fictitious names because their true names, involvement, and capacities, whether individual, associate, corporate or governmental, are not now known to PLAINTIFFS. Based on information and belief, PLAINTIFFS allege that each of these Defendants are negligent or responsible in some manner for the events alleged in this Complaint, either as manufacturers, suppliers, sellers, distributors, physicians, surgeons, anesthetists, nurses, other medical practitioners, pharmacists, hospitals or hospital attendants, ambulance companies or attendants, or otherwise. PLAINTIFFS are uncertain as to the manner or function of these Defendants, whether as manufacturers, suppliers, sellers, distributors, physicians, surgeons, anesthetists, nurses, other medical practitioners, pharmacists, hospitals or hospital attendants, ambulance companies or attendants, or otherwise, and PLAINTIFFS will ask leave to amend

this Complaint to specifically name these Defendants when such names, capacities, functions, occupations and businesses of these Defendants have been more fully ascertained.

251. Based on information and belief, PLAINTIFFS allege that, at all times herein mentioned, PASHA, SHERIDAN, LEONG, and DOES 1-10 were the agents, servants and employees of each of the other Defendants named in this Complaint, and at all material times were acting within the course and scope of their agency, service and employment.

252. At all times herein mentioned, Defendants DOES 1 through 5, inclusive, were and now are corporate and/or public entities duly organized and existing under the laws of the State of California, and were at all times engaged in owning, operating and maintaining hospitals and other medical facilities to treat detainees in the State of California.

253. All conditions precedent to this lawsuit have been performed, have occurred, or have been waived, including providing pre-suit notice to the Defendants pursuant to California Code of Civil Procedure § 364 and Government Code § 910.

254. At all times and places mentioned herein, each of these Defendants carelessly and negligently cared for and treated CASTANEDA for his above-described medical condition and his general medical condition, and each of these Defendants provided hospital, medical, emergency, anesthetic, nursing, laboratory, x-ray, and ambulance services, care, and

attention in a careless and negligent manner. Each of these Defendants carelessly and negligently treated, managed, monitored and supervised CASTANEDA's condition during his detention by the State of California during 2005 and 2006, which, among other things, directly and proximately resulted in certain injury and disability to CASTANEDA, all to his general damage.

255. As a direct and proximate result of these Defendants' negligence and carelessness, CASTANEDA suffered certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

256. As a further direct and proximate result of the negligent acts, omissions and conduct of these Defendants and of the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to him.

THIRTEENTH CAUSE OF ACTION
Medical Negligence against HUNTING and DOES 1-10 (WRONGFUL DEATH AND SURVIVAL ACTION)

257. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

258. HUNTING was, at all material times, a medical doctor licensed by the State of California and practicing medicine in California.

259. All conditions precedent to this lawsuit have been performed or have occurred, including providing pre-suit notice to the Defendants pursuant to California Code of Civil Procedure § 364. This action is brought under the California Wrongful Death Statute (CCP §§ 377.60, 377.61, 377.62) and the California Survival Statutes (CCP §§ 377.20, 377.21, 377.30).

260. ICE brought CASTANEDA to the emergency room at Scripps Mercy Chula Vista on July 13, 2006. CASTANEDA was examined at the Scripps emergency room by Juan Tovar, M.D., who noted a 1.5 cm. by 2 cm. fungating lesion on his penis with discharge but no lymphadenopathy, and made arrangements for admission to the hospital. His impression was: "penile mass, rule out cancer, versus infectious etiology."

261. HUNTING, a Scripps urologist, performed a very brief examination of CASTANEDA on July 13, 2006. He did not obtain CASTANEDA's prior family history of cancer and believed CASTANEDA's lesion was "probably condyloma" (genital warts). HUNTING declined to treat him and made the erroneous assumption that CASTANEDA's lesion was not cancerous without the benefit of a diagnostic biopsy. As a result of HUNTING's intervention, a circumcision

and biopsy were not performed at Scripps to rule out cancer.

262. At all times and places mentioned herein, each of these Defendants carelessly and negligently cared for and treated CASTANEDA for his above-described medical condition and his general medical condition, and each of these Defendants provided hospital, medical, emergency, anesthetic, nursing, laboratory, x-ray, and ambulance services, care, and attention in a careless and negligent manner. Each of these Defendants carelessly and negligently treated, managed, monitored and supervised CASTANEDA's condition in July 2006 which, among other things, directly and proximately resulted in certain injury and disability to CASTANEDA, all to his general damage.

263. As a direct and proximate result of these Defendants' negligence and carelessness, CASTANEDA suffered certain injuries, including: the amputation of his penis; development of metastatic cancer; great physical, mental, and emotional pain; disfigurement and disability; and death.

264. As a further direct and proximate result of the negligent acts, omissions and conduct of these Defendants and of the injuries caused to CASTANEDA, CASTANEDA was required to and did incur expenses for services of hospitals, doctors, and other medical care and treatment in an amount not now known to PLAINTIFFS.

FOURTEENTH CAUSE OF ACTION
Facial and As Applied Constitutional Challenge to Policy, Custom, and/or Practice for Providing Medical Care to Immigration Detainees Against CHERTOFF, ICE, DIHS, DHS, and UNITED STATES

265. PLAINTIFFS incorporate by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

266. An actual controversy now exists between PLAINTIFFS, on the one hand, and Defendants UNITED STATES, CHERTOFF, ICE, DIHS, and DHS (collectively the "U.S. AGENCIES"), on the other hand, as to whether the Defendants' policy, custom, and/or practice for providing medical care to detainees violates detainees' rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

267. The parties require a judicial declaration of rights in order to properly address PLAINTIFFS' constitutional challenge to the U.S. AGENCIES' policy, custom, and/or practice for providing medical care to detainees and to the U.S. AGENCIES' application to CASTANEDA. Specifically, the parties require a declaration from the Court regarding whether, and precisely how, the U.S. AGENCIES' policy, custom, and/or practice for providing medical care to detainees, violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

JURY TRIAL DEMAND

PLAINTIFFS demand a jury trial to resolve all claims brought herein except for the claim against THE UNITED STATES OF AMERICA under the FTCA, which must be adjudicated by the Court.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFFS pray that, after due proceedings, judgment be entered in favor of PLAINTIFFS and against all Defendants, jointly and severally, and that this Court:

(a) Award PLAINTIFFS all compensatory damages reasonable under the circumstances, including physical pain and suffering, mental anguish and emotional distress, disfigurement, medical expenses, loss of enjoyment of life, and any other compensatory damages, for each count alleged in the Complaint;

(b) Award PLAINTIFFS punitive damages against all Defendants sued in their individual capacity, except for HUNTING. (PLAINTIFFS acknowledge that punitive damages are not available against the governmental entity defendants);

(c) Award all damages available to PLAINTIFFS under the California and Federal Survival Rule as well as the California Wrongful Death Statute

(d) Award PLAINTIFFS reasonable attorneys' fees, expert fees, and court costs under 42 U.S.C. §1988 for the prosecution of their 42 U.S.C, § 1983 claims;

(e) Award PLAINTIFFS legal interest on all damages awarded from the date of judicial demand until paid;

(f) Award PLAINTIFFS (1) declaratory relief specifying that certain policies, practices, and/or customs for providing medical care to detainees violate the Fifth, Eighth, and Fourteenth Amendments; (2) permanent injunctive relief enjoining the U.S. AGENCIES from continuing to enforce these unconstitutional policies, practices, and/or customs; and (3) declaratory relief specifying that the U.S. AGENCIES' application of these policies, practices, and/or customs to CASTANEDA violated the Fifth, Eighth, and Fourteenth Amendments; and

(g) Award PLAINTIFFS such other and further relief as this Court deems just and proper, including attorneys' fees and costs, where applicable.

Dated this 30th day of May, 2008

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UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

YANIRA CASTANEDA, Plaintiff, vs. THE UNITED STATES OF AMERICA, et al. Defendants.	Case No.: CV 07-07241 DDP (JCx) **ORDER APPROVING STIPULATION TO DISMISS CHRIS HENNEFORD, EUGENE MIGLIACCIO, AND TIMOTHY SHACK, M.D.** (Filed Oct. 23, 2009)

The parties stipulation for dismissal is approved and TIMOTHY SHACK, M.D., EUGENE MIGLIACCIO, and CHRIS HENNEFORD are hereby DISMISSED

with prejudice. Each party to bear its own fees and costs.

DATED: October 23, 2009

DATED: October 23, 2009

/s/ Dean D. Pregerson
THE HONORABLE
DEAN D. PREGERSON

PETITIONER'S BRIEF

Supreme Court, U.S.
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DEC 4 - 2009
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147 (5)

No. 08-1529

IN THE
Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,
Petitioners,

v.

YANIRA CASTANEDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER COMMANDER STEPHEN GONSALVES

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a) make the Federal Tort Claims Act the exclusive remedy for claims arising from medical care and related functions provided by Public Health Service personnel, thus barring *Bivens* actions?

PARTIES TO THE PROCEEDING

The petitioners here and appellants below are Dr. Esther Hui and Commander Stephen Gonsalves of the United States Public Health Service.

Petitioners and appellants below Eugene Migliaccio, Chris Henneford, and Timothy Shack were dismissed as defendants by plaintiffs and dismissed as petitioners pursuant to stipulation of the parties.

Respondent Yanira Castaneda is the personal representative of the estate of Francisco Castaneda. Respondent Vanessa Castaneda is the beneficiary of the estate, by and through her mother and guardian Lucia Pelayo.

The United States of America, George Molinar, Daniel Hunting, Susan Pasha, and Robert Mekemson are defendants in the district court but were not parties to the appeal. The United States was an *amicus* in the court of appeals and in this Court on petition for certiorari.

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JURISDICTION

The Ninth Circuit's judgment was entered on October 2, 2008. A timely petition for rehearing *en banc* was denied on January 29, 2009. Pet. App. 81a. On April 10, 2009, Justice Kennedy extended the time to file a petition for writ of certiorari to May 29, 2009. On May 19, 2009, he further extended the time to June 12, 2009. The petition was timely filed on June 11, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the scope of the immunity granted by 42 U.S.C. § 233(a), which provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 ... for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

Additional relevant statutes are reproduced in the statutory appendix to this brief.

STATEMENT OF THE CASE

Petitioners – a commissioned officer, Commander Stephen Gonsalves, and a civilian physician, Esther Hui, M.D., in the federal Public Health Service ("PHS") – are dedicated to providing medical care to underserved populations, including many who might otherwise have no access to health care at all. Where the PHS fails to provide adequate care – as the United States has admitted occurred in this case – the PHS has failed to carry out its mission.

Congress has determined, however, that the best way to ensure that the PHS provides quality care is to block suits against PHS employees in their personal capacities, because the threat of personal liability would prevent the PHS from recruiting and retaining qualified professionals. Therefore, in 42 U.S.C. § 233(a) Congress unequivocally barred all actions – including *Bivens* claims – against PHS employees based on medical or related activities. Congress instead authorized suits for deficient PHS medical care against the United States, which is the entity that can most readily make any needed systemic reforms and is certain to be able to satisfy any judgment. The United States' liability arises whenever the PHS falls short of state law standards of care, which are more stringent than the standards used to determine whether there has been a violation of the Constitution. Individuals who are injured by deficient PHS care are thereby ensured compensation for their injuries commensurate with

the compensatory remedies that other Americans have when they obtain private medical care.

A. The Public Health Service

The PHS is one of the seven uniformed services of the United States. With origins dating back to the 1798 Act for the Relief of Sick and Disabled Seamen, the PHS is today part of the Department of Health and Human Services and the employer of more than 6,000 commissioned officers and nearly 14,000 civilian professionals. PHS commissioned officers are organized along military lines and maintain a military rank equivalent. 42 U.S.C. § 207; *see* Pet. App. 3a-4a n.3.

PHS commissioned officers and civilian employees are generally health care professionals who forgo the financial rewards of private practice in order to provide health care to underserved groups. PHS personnel undertake patient care and medical research in a wide variety of settings. They frequently provide medical care to disadvantaged populations, such as disaster victims and refugees. In times of war or national emergency, PHS commissioned officers may be called into military service. 42 U.S.C. § 217.

B. Factual Background

The United States has admitted negligence in its care of decedent Francisco Castaneda, J.A. 328-29, but as we explain below, the record shows that Petitioners played at most a modest role in Mr. Castaneda's care. The record also demonstrates that PHS personnel arranged for Mr. Castaneda to undergo a biopsy at outside medical facilities on no

fewer than three separate occasions. Despite these efforts, Mr. Castaneda did not receive a timely biopsy. But the suggestions by the lower courts that Petitioners were deliberately indifferent to Mr. Castaneda's condition are not borne out by the record.

Mr. Castaneda was incarcerated by the State of California in December 2005. J.A. 335. Respondents allege that he sought, but was denied, medical treatment for a penile lesion while in state custody. *Id.* Medical records indicate that Mr. Castaneda had the lesion for two to three years prior to his incarceration, but that it worsened around the time he entered state custody. J.A. 109, 119, 134, 137. He had not previously sought treatment for it. J.A. 137.

On March 27, 2006, Mr. Castaneda was transferred to federal custody in the San Diego Correctional Facility operated by the Immigration and Customs Enforcement service ("ICE") of the Department of Homeland Security ("DHS"). Pet. App. 3a. Under an interagency agreement, the PHS's Division of Immigration Health Services ("DIHS") provides health care services to alien detainees in ICE custody in San Diego. J.A. 22-23.

The day after he entered federal custody, Mr. Castaneda was seen by Lt. Daniel Walker, a PHS physician's assistant. J.A. 109-10. Lt. Walker noted that Mr. Castaneda had both severe phimosis (congenital narrowing of the foreskin) and a penile lesion. J.A. 110. He recommended a urology consultation, particularly in light of a family history

of cancer. J.A. 112. A treatment authorization request was submitted to DIHS officials in Washington. After further review by a physician in Washington, officials approved the request on May 31, granting authorization for an outside specialist to excise the lesion for biopsy and provide other treatment. J.A. 92-94, 113-15. The treatment request further indicated "urology unable to see this pt [patient]" and recommended that he see a surgeon for the procedures. J.A. 114.

A week later, Mr. Castaneda was examined by Dr. John Wilkinson, a private oncologist. J.A. 115-25. Dr. Wilkinson agreed that the lesion could be virally based (*e.g.*, a genital wart) or cancerous, but for medical reasons he could not perform the biopsy himself and referred Mr. Castaneda for "urgent urological assessment." J.A. 116, 125. Dr. Wilkinson spoke with Petitioner Hui, a civilian PHS physician at the San Diego Correctional Facility, and offered to admit Mr. Castaneda to Dr. Wilkinson's hospital for the urological consultation and biopsy. J.A. 124, 125. Under DIHS policy, Dr. Hui indicated that the procedures would be arranged on an out-patient basis instead. J.A. 124, 125; *see* J.A. 194-95.[1]

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[1] Although Dr. Hui's notes describe the urological consultation and biopsy as an "elective outpatient procedure," she also wrote that Mr. Castaneda "need[ed] to be seen by a urologist" and that Mr. Castaneda would be referred back to the oncologist Dr. Wilkinson "[i]f the biopsy proves to be cancerous." J.A. 125. As described below, Mr. Castaneda was in fact examined by two separate private urologists with authorization to perform biopsies in the following months.

Less than a week later, on June 12, Mr. Castaneda filed a grievance because he had not yet received treatment. J.A. 127-30. In the meantime, Lt. Walker, the PHS physician's assistant, attempted to arrange an examination by an outside urologist. J.A. 131-32. By June 23, Lt. Walker had located a urologist, Dr. Robert Masters, who was willing to see Mr. Castaneda but wanted to speak with Dr. Wilkinson first. *Id.* Around June 30, Lt. Walker met with Mr. Castaneda and explained that he had not been diagnosed with cancer because no biopsy had yet occurred, and that further direction about his treatment was needed from a urologist. J.A. 133-34.[2]

On July 12, Lt. Walker continued to try to reach the urologist Dr. Masters. J.A. 135-37. Lt. Walker also met with Mr. Castaneda concerning his grievance and again explained that he was not being denied treatment, and that Lt. Walker was in fact trying to arrange such treatment with an outside provider. *Id.*

The next day, a treatment authorization request was approved by DIHS in Washington for Mr. Castaneda to undergo a biopsy and surgery, including possible circumcision. J.A. 139-40. Mr. Castaneda was taken to the emergency room at Scripps Mercy hospital for this evaluation and

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[2] The record of this conversation states "this detainee ... DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory." J.A. 133. But this and other records indicate that PHS employees were working to obtain an outside urological assessment to determine the course of further treatment, including a biopsy if indicated. J.A. 134; *see also, e.g.*, J.A. 125, 131-32, 139-40, 155.

treatment. J.A. 140-48.[3] Mr. Castaneda was examined by several doctors at Scripps Mercy, including a urologist, Dr. Daniel Hunting. *Id.* Based on his examination and consultation with other physicians on the hospital staff, Dr. Hunting found "nothing suspicious for carcinoma" and concluded instead that "this is condyloma" (genital warts). J.A. 145. Dr. Hunting therefore referred Mr. Castaneda "back to his primary treating urologist, who can do the elective program which has been advised. This is not an urgent problem and he should followup [sic] with his prior urologist at ElDorado [sic] and have elective circumcision or condylosis or ALARA cream." *Id.*; *see also* J.A. 147 (Scripps Mercy's record of "Medical Decision Making": "Dr. Hunting feels that this is condyloma and not a cancerous mass that patient has had for quite some time"). As a result, the hospital discharged Mr. Castaneda without the biopsy or surgery that DIHS had authorized. J.A. 146.

Dr. Hunting's conclusions were communicated to Lt. Walker, who noted that Scripps Mercy "had a urologist confirm via exam condylom acuminata, no

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[3] The district court criticized DIHS for sending Mr. Castaneda to see a urologist at Scripps Mercy rather than to "Dr. Wilkinson and/or Dr. Masters, the treating doctors who were familiar with Castaneda's condition." Pet. App. 46a. In fact, because of his schedule, Dr. Masters had not yet been able to examine Mr. Castaneda at all (and thus was not his "treating doctor[]"), J.A. 137, while Dr. Wilkinson, the oncologist, had made clear that Mr. Castaneda should see a *urologist* and should return to Dr. Wilkinson only if a biopsy showed cancer, J.A. 123, 125. DIHS therefore sent Mr. Castaneda to Scripps Mercy where he could be examined by a urologist immediately.

need for biopsy." J.A. 148 (original in all caps). Nonetheless, Mr. Castaneda and Lt. Walker were both upset that the hospital had discharged Mr. Castaneda without the treatment and biopsy DIHS had authorized. J.A. 149-50; *see* J.A. 95. Lt. Walker sought early release for Mr. Castaneda so that he could obtain on his own the treatment that Dr. Hunting had deemed to be non-urgent and elective. J.A. 150; *see also* J.A. 163. Ultimately, however, ICE denied Mr. Castaneda's early release due to his legal status. J.A. 171, 177.

In the meantime, Mr. Castaneda continued to press for treatment and filed a new grievance, but was advised that the outside specialist, Dr. Hunting, had determined he did not have cancer. J.A. 150-54. Nonetheless, in August DIHS again authorized treatment of Mr. Castaneda by an another urologist – this time Dr. Masters – to "[b]iopsy lesion on penis [and for] surgical correction of the glans penis circumcision." J.A. 154-56. Dr. Masters agreed with prior assessments that Mr. Castaneda's condition was probably genital warts (condyloma accuminata), with the parenthetical notation "(rule out malignant neoplasm)," *i.e.*, cancer. J.A. 159. He recommended circumcision to remove the lesion, and also to provide a biopsy. *Id.* However, he did not perform that operation immediately, but advised that it could be done on a "come-and-go outpatient" basis and offered to "arrange for circumcision at a local hospital." *Id.* Thus, once again, although DIHS had authorized a biopsy and treatment for Mr. Castaneda, he was returned by an outside physician to the San Diego

Correctional Facility without receiving the authorized test and treatment.

Dr. Masters spoke to Lt. Walker the same day he examined Mr. Castaneda. J.A. 161. Lt. Walker's record of the conversation notes Dr. Masters's diagnosis of genital warts and recommended treatment of circumcision and describes these as "elective procedures the patient may need in the future." *Id.* There is no mention in this record of the desirability of a biopsy. Therefore, Lt. Walker advised Mr. Castaneda that his treatment was elective and could be pursued after his release, and that Lt. Walker would again seek early release. J.A. 162-63.

Shortly thereafter, a memorandum was written by Petitioner Gonsalves, J.A. 161-68, a Commander in the PHS, in the course of his duties as Health Services Administrator for DIHS at the San Diego Correctional Facility, *see* J.A. 32-33. The memorandum authored by Cmdr. Gonsalves was not a treatment authorization request and did not purport to approve or deny a treatment authorization request, but rather was based on information obtained from unspecified DIHS clinical staff in consultation with outside specialists. J.A. 167-68. The record does not reflect whether Cmdr. Gonsalves relied only on oral reports from the clinical staff in preparing the memorandum or also consulted written records and, if the latter, which records he had before him. Consistent with Dr. Hunting's diagnosis and with Lt. Walker's record of what he was told by Dr. Masters, the administrative memorandum states: "This is to inform that the off-

site specialist you were referred to for your medical condition reports that any surgical intervention for the condition would be elective in nature. An independent review by our medical team is in agreement with the specialist's assessment. The care you are currently receiving is necessary, appropriate and in accordance with our policies." *Id.*

Subsequently, Mr. Castaneda's symptoms grew worse. J.A. 168-73. On October 23, Mr. Castaneda asked to be seen by Lt. Walker because of the latter's familiarity with his condition. J.A. 174. Lt. Walker submitted another treatment authorization request to Washington. J.A. 175-79. The request stated that Mr. Castaneda had "been seen by local urologist and oncologist and both are not impressed of possible cancerous lesion(s), however, there is an elective component to having the circumcision completed." J.A. 177. This treatment authorization request was denied by a DIHS physician in Washington, Dr. Neil Collins, on the ground that "[c]ircumcisions are not a covered benefit." J.A. 177; *see also* J.A. 214 (official DIHS policy).

On November 17, Mr. Castaneda was transferred by ICE to its San Pedro Service Processing Center in the Los Angeles area. J.A. 358. After Mr. Castaneda's transfer, Petitioners' limited involvement with him ended.[4] On December 4,

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[4] An attorney from the American Civil Liberties Union, Tom Jawetz, began contacting ICE and DIHS personnel about Mr. Castaneda's case on December 5, 2006, after his transfer. *See* Decl. of Tom Jawetz in Support of Plaintiff's Opposition to Defendants' Rule 12(b)(1) Motion to Dismiss. Mr. Jawetz's initial letter was addressed to officials at San Pedro, but was

DIHS employees at San Pedro submitted a treatment authorization request to Washington for Mr. Castaneda to receive a urology consultation with Dr. Lawrence Greenberg, which was approved on December 5. J.A. 187-88. Respondents allege that Dr. Greenberg stated Mr. Castaneda's penis was a "mess" and required circumcision, and that Dr. Greenberg would fax a recommendation to the medical officials at San Pedro later that day. J.A. 361. Accordingly, Mr. Castaneda was taken back to San Pedro. *Id.* A treatment authorization request was approved by Dr. Collins of DIHS in Washington to see another urologist, Dr. Asghar Ashkuri, on January 25, 2007. J.A. 191. Dr. Ashkuri determined that Mr. Castaneda "likely [had] penile cancer" and recommended a biopsy on an outpatient basis, which he would schedule when authorization was received. J.A. 193.

Mr. Castaneda was released by ICE on February 5. J.A. 363. Three days after his release, Mr. Castaneda went to the emergency room at Harbor-UCLA Hospital, where he was diagnosed with squamous cell carcinoma. Pet. App. 52a. Six days later, his penis was amputated and he began

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copied by fax to other federal employees, including Petitioner Gonsalves at San Diego. *Id.* Ex. 1. The record does not indicate whether Cmdr. Gonsalves received this letter, but as the DIHS Health Services Administrator at San Diego, he may have been involved in gathering the medical records requested by Mr. Jawetz. Thereafter, Mr. Jawetz had several other communications with officials at San Pedro and in Washington, but not with Petitioners. *Id.* Exs. 2-6.

receiving chemotherapy. *Id.* A year later, on February 16, 2008, Mr. Castaneda died. *Id.*

C. Statutory Background

This case concerns the scope of the immunity provided by 42 U.S.C. § 233(a), which Congress enacted as part of the Emergency Health Personnel Act of 1970 ("Act"), Pub. L. No. 91-623, 84 Stat. 1868. The Act as a whole constituted an effort by Congress to reinvigorate the PHS and its mission of providing medical care to underserved populations. *See id.* § 2. Section 233(a) in particular responded to a concern voiced by the Surgeon General that the PHS was having difficulty retaining high-quality medical personnel because "low pay" prevented PHS personnel from "tak[ing] out the customary liability insurance." 116 Cong. Rec. 42,543 (1970) (Rep. Staggers, House sponsor of the Act); *see also id.* at 42,977 (Sen. Javits).

Congress addressed these liability concerns by immunizing PHS personnel for injuries or death arising out of the performance of their duties and making a Federal Tort Claims Act ("FTCA") action against the United States the "exclusive" remedy for such injuries. Specifically, § 233(a) provides:

> The remedy against the United States provided by [the FTCA] ... for damage for personal injury, including death, resulting from the performance of medical ... or related function ... by any [PHS officer or employee] while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the

> same subject-matter against the officer or employee ....

42 U.S.C. § 233(a). Section 233(a) thus provides a remedy for injured parties against the United States under the FTCA and acts as a categorical bar to "any other civil action ... by reason of the same subject-matter" against PHS personnel. *Id.*

Like all other federal employees, PHS personnel are also protected by another immunity that Congress enacted in 1988, known as the Westfall Act, 28 U.S.C. § 2679(b), which overlaps with but is distinct from the immunity provided by § 233(a). The Westfall Act provides:

> (1) The [FTCA] remedy against the United States ... for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act ... of any employee of the Government ... is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee .... Any other civil action ... arising out of or relating to the same subject matter against the employee ... is precluded ....
>
> (2) Paragraph (1) does not extend or apply to a civil action ...
>
> (A) which is brought for a violation of the Constitution of the United States ....

28 U.S.C. § 2679(b)(1)-(2).

The Westfall Act is thus like § 233(a) in making the FTCA remedy exclusive, but unlike § 233(a) in

that it applies to injuries caused by "any Government employee" for any performance of their duties and, most critically, in that it contains an explicit exception for civil actions "brought for a violation of the Constitution of the United States." *Id.* As this Court has explained, government employees (like PHS personnel) who fall under both the generally applicable Westfall Act and a specific immunity provision (such as § 233(a)) receive protection from *both* statutes. *See United States v. Smith*, 499 U.S. 160, 170-73 (1991).

D. Procedural History

Mr. Castaneda commenced this action on November 2, 2007. Pet. App. 8a. After his death, Mr. Castaneda's personal representative and heir were substituted as Plaintiffs and are Respondents in this Court. *See id.* Respondents' Third Amended Complaint asserts FTCA claims against the United States; *Bivens* claims for inadequate medical care and equal protection violations against several DHS (ICE) and PHS (DIHS) employees, including Petitioners; § 1983 and state law tort claims against certain California state employees for the period Mr. Castaneda was incarcerated by the State; and a state law medical negligence claim against Dr. Hunting, the private urologist who examined Mr. Castaneda at Scripps Mercy, concluded he did not have cancer, and declined to carry out the biopsy and treatment DIHS had authorized. *See* J.A. 339-43, 377-404.[5]

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[5] Respondents filed their Third Amended Complaint after the district court ruled on the PHS defendants' motion to dismiss, but the Ninth Circuit relied on that version of the complaint in

On January 14, 2008, the five PHS defendants, who were at that time represented by Department of Justice attorneys, moved under Fed. R. Civ. P. 12(b)(1) to dismiss the *Bivens* claims against them pursuant to § 233(a). Pet. App. 8a-9a. The motion was supported by declarations showing that the movants were PHS employees and a certification that they were acting within the scope of that employment in connection with the events alleged in the complaint. J.A. 22-23, 32-34. As permitted under Rule 12(b)(1), Respondents also submitted evidence in opposing the motion.

The district court (Pregerson, J.) denied the motion to dismiss, finding that § 233(a) does not provide immunity to constitutional claims. The court opined that § 233(a) is silent about constitutional tort claims for medical care provided by PHS employees within the scope of their employment, but that the "statutory trail" leads to 28 U.S.C. § 2679(b) (*i.e.*, the Westfall Act), which the court read as expressly authorizing such suits. Pet. App. 59a-61a. The court observed that § 233(a) refers to "[t]he remedy against the United States provided by sections 1346(b) and 2672 of title 28," and that § 1346 refers in turn to chapter 171 of title 28, which includes the Westfall Act. *Id.* The court therefore

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its opinion. *See* Pet. App. 2a n.1. Therefore, the Third Amended Complaint has been included in the appellate record, J.A. 330-407, and is cited as Respondents' operative pleading. A claim in the Third Amended Complaint for injunctive and declaratory relief against a number of United States agencies and senior DHS officials has been dismissed by stipulation. D. Ct. Docket No.175.

concluded that the constitutional tort exception to the Westfall Act immunity applies to the § 233(a) immunity as well. Pet. App. 61a. The court rejected the Second Circuit's contrary decision in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), as well as the dozens of appellate and district court decisions that are in accord with *Cuoco*. Pet. App. 64a-65a.

The five PHS defendants appealed that denial of immunity under the collateral order doctrine. Each PHS defendant also retained counsel in place of the Department of Justice attorneys who had previously represented him or her.[6] Pending appeal on the immunity issues, the PHS defendants moved in the district court for a stay of discovery on the *Bivens* claims against them, but that court denied a stay and issued an order compelling discovery. J.A. 12. The PHS defendants then applied to the Ninth Circuit for a stay of discovery on the *Bivens* claims, which that court granted, and which remains in place pending proceedings in this Court. J.A. 16. But other aspects of the case have moved forward in the district court. Most significantly, the United States has filed a Notice of Admission of Liability for Medical Negligence. J.A. 328-39. This notice admits the United States' liability (negligence and causation) for Respondents' medical negligence claims under the FTCA, but reserves the issues of the nature and extent of damages. *Id.*

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[6] Petitioners obtained separate counsel to ensure that their interests would be represented separately from those of their co-defendant, the United States. The United States has continued to support Petitioners as an *amicus* in the court of appeals and in this Court.

When it ruled on the appeal, the Ninth Circuit panel (Reinhardt, Berzon, and Milan Smith, JJ.) affirmed the denial of immunity, although on a different rationale from the district court's. The court of appeals believed that under *Carlson v. Green*, 446 U.S. 14 (1980), *Bivens* claims are not displaced by § 233(a) because the remedies provided against the United States under the FTCA and the remedies provided by *Bivens* claims are not "equally effective," Pet. App. 13a-18a, and because § 233(a) purportedly does "not explicitly declare § 233(a) to be a substitute for a *Bivens* action," Pet. App. 19a. With respect to the latter point, the Ninth Circuit appeared to treat the absence of words such as "*Bivens*" or "constitutional claims" in § 233(a) as dispositive, notwithstanding Congress's categorical command that the FTCA provides the "exclusive" remedy for claims arising out of medical or related activities by PHS officials. *See id.* The Court also reasoned that because § 233(a) was enacted shortly before *Bivens* was decided, the statute could not bar *Bivens* claims. *Id.*

The Ninth Circuit sought to explain away language in *Carlson* that expressly recognizes § 233(a) as a provision that supplants *Bivens*. *Carlson* emphasized "the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See ... 42 U.S.C. § 233(a) ... (malpractice by certain Government health personnel)." 446 U.S. at 20. The Ninth Circuit seized on the parenthetical reference to "malpractice" in that quotation to conclude that *Carlson* viewed § 233(a) as precluding only state law

malpractice claims against PHS employees, not *Bivens* claims. Pet. App. 35a.

The court of appeals also pointed to the original caption of § 233 ("Defense of Certain Malpractice and Negligence Suits") and legislative history indicating congressional concern about the potential "malpractice" liability faced by PHS employees as narrowing the scope of the statute. Pet. App. 22a-23a. And the court engaged in an extensive review of the legislative history of the later-enacted Westfall Act (which the court of appeals referred to as the LRTCA), from which it inferred that Congress wanted all federal employees to enjoy exactly the same level of immunity, even though the Westfall Act has an express constitutional tort exception that is absent from § 233(a). Pet. App. 24a-28a. The court conceded that its decision conflicted with the Second Circuit's *Cuoco* decision, but dismissed *Cuoco* as incorrect. Pet. App. 35a-37a.

Finally, the Ninth Circuit considered whether there are "special factors" precluding *Bivens* claims here. Although the court suggested this argument was not raised in the district court, Pet. App. 37a-38a, it addressed the argument on the merits and concluded that *Carlson*'s rejection of special factors requires the same result here, and also that the existence of an alternative FTCA remedy could not be a special factor because it is non-uniform. Pet. App. 38a-39a. A petition for rehearing *en banc* was denied. Pet. App. 82a.

The PHS defendants sought certiorari review in this case and in a separate petition in No. 08-1547,

supported by the United States as *amicus curiae*. The Court granted the petitions and consolidated the cases for oral argument. Thereafter, two of the petitioners in this case and the sole petitioner in No. 08-1547 were voluntarily dismissed by stipulation. Cmdr. Gonsalves and Dr. Hui remain as Petitioners before the Court.

SUMMARY OF ARGUMENT

No one questions that Respondents should have a legal remedy for the PHS's failure to diagnose and treat Mr. Castaneda's cancer. And they do have one. The United States has admitted liability under the FTCA. The question presented here is whether, in addition, an implied cause of action under *Bivens* may go forward against individual PHS officers and employees in their personal capacities. Congress has answered that question clearly and unambiguously by prohibiting all such personal liability suits in this context.

By its plain terms, 42 U.S.C. § 233(a) bars every private action against PHS personnel for injury or death resulting from the performance of medical or related functions in the scope of their employment. Within that sphere, § 233(a) makes the FTCA remedy against the United States "exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee." A *Bivens* claim is indisputably "any other civil action" and is therefore prohibited. It would be hard to find clearer language in the U.S. Code.

Ignoring the plain statutory text, the Ninth Circuit conjured up a constitutional tort exception to

§ 233(a) through a kind of interpretative alchemy, making use of legislative history and other extratextual matter. Given § 233(a)'s unequivocal command, that entire enterprise was impermissible. But it also fails on its own terms. The scant legislative history shows that § 233(a) was enacted because the threat of personal liability was undermining recruitment and retention of qualified PHS personnel, a rationale that applies with full force to bar *Bivens* liability. In addition, references to "malpractice" in floor statements and the section's caption are entirely consistent with a broad immunity that has no exception for constitutional torts. Nor does the fact that § 233(a) was enacted shortly before *Bivens* was decided mean that the statute's immunity language does not cover *Bivens* claims. Congress's directive to the courts to bar "any other civil action" plainly prohibits courts from creating new causes of action as well as allowing old ones.

The absence of any constitutional tort exception to § 233(a)'s immunity is confirmed by Congress's express inclusion of such an exception to the separate immunity provided in the later-enacted Westfall Act. Congress could have amended § 233(a) to add such an exception when it passed the Westfall Act, but it did not do so – even though it has amended § 233 nearly a dozen times before and after. Contrary to the district court's reasoning, § 233(a) does not "incorporate" the Westfall exception. Nor, as the Ninth Circuit believed, does the Westfall Act's legislative history suggest that Congress intended to strip PHS personnel of the heightened immunity

that § 233(a) plainly provides. The simple fact is that the Westfall Act has a constitutional claim exception and § 233(a) does not. That demonstrates that Congress intended PHS personnel to have a protection from liability that most other federal employees do not have.

The plain language of § 233(a) should have ended this case long ago, because this Court's *Bivens* decisions establish that an exclusive remedy statute must be enforced according to its terms. The Ninth Circuit's contrary conclusion was based on dictum from this Court's decades-old decision in *Carlson v. Green*, 446 U.S. 14 (1980). The court of appeals read *Carlson* to require Congress to jump over particularly high hurdles before it may preclude a *Bivens* claim. That reading cannot be correct given that *Carlson* cites § 233(a) as a prime example of a statute that makes the FTCA remedy exclusive. More fundamentally, in *Carlson* and later cases this Court has made abundantly clear that Congress is entitled to great deference in this area and need not use any magic words to preclude *Bivens* claims or mention such claims explicitly. Indeed, the Court has repeatedly ruled that Congress may bar *Bivens* claims simply by creating an alternative remedy with the intent that it be exclusive. *A fortiori*, Congress may achieve that result when it says outright that an alternative remedy is exclusive, as it has in § 233(a).

Because Congress made an alternative remedy exclusive, that intent governs, regardless whether the alternative remedy is "equally effective" as *Bivens*. The "equally effective" inquiry is a tool for

discerning legislative intent when Congress is silent, not for trumping that intent when Congress has spoken. Accordingly, this Court has made clear time and again that Congress may displace *Bivens* with a remedy that is not "equally effective."

The deference due to Congress in this area is further underscored by the Court's "special factors" cases. Those cases indicate that even where Congress has not created an alternative remedy, the legislature's paramount remedial competence may require the judiciary to stay its hand before creating a common law constitutional remedy. The deference due to Congress's determination of which remedies should be available for any alleged wrong is at its zenith in a situation like one, where Congress has expressly stated that one remedy is exclusive and any other remedy is barred.

Finally, here the alternative remedy provided by Congress is substantial – even if not equally effective as *Bivens*. The FTCA provides a remedy against the United States for deficient PHS medical care, even when that care is merely negligent under state law tort standards. And though it is true that the FTCA does not provide *additional* relief for a constitutional violation as such, this Court has clearly stated that there need not be a separate constitutional remedy, above and beyond the relief for a non-constitutional wrong, in order for relief to be adequate. Moreover, Respondents here may be eligible under the FTCA and California malpractice law to receive enhanced damages against the United States if they can in fact demonstrate a level of fault beyond negligence. In any event, a medical malpractice remedy against the

United States is a robust one that is clearly adequate.

ARGUMENT

I. The Plain Language of § 233(a) Bars Respondents' *Bivens* Claims Against Petitioners.

A. The Text of § 233(a) Makes the FTCA the Exclusive Remedy Available to Respondents.

"As in any case of statutory construction, [this Court's] analysis begins with the language of the statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). Section 233(a) provides that:

> The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 [*i.e.*, the FTCA] ... for damage for personal injury, including death, resulting from the performance of medical ... or related functions ... by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. § 233(a). By its plain terms, this provision grants complete immunity to PHS officers and employees acting within the scope of their employment from any action claiming damages due

to personal injury or death resulting from medical or related functions.

That immunity encompasses the *Bivens* claims asserted against Petitioners here. Petitioners – a commissioned PHS officer and a civilian PHS employee – were indisputably "acting within the scope of [their] office or employment." And the claims against them clearly allege "personal injury [and] death, resulting from the performance of medical ... or related functions." Under the plain language of § 233(a), Respondents' FTCA remedy against the United States is exclusive, and they may not assert "any other" claims against Petitioners "by reason of the same subject-matter."

This language is so plain as not to require further elaboration. Nonetheless, the breadth of the immunity afforded by § 233(a) is emphasized by multiple elements of the statute. The section provides that an FTCA claim against the United States is (1) "exclusive of" (2) "any" (3) "other civil action ... by reason of the same subject-matter." Each of these elements underscores that § 233(a) precludes all claims for actions falling within the scope of the statute, including *Bivens* claims.

First, in declaring that an FTCA action against the United States is "exclusive," Congress employed a broad term that rules out implied limitations or exceptions. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992) ("[T]he description of our jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court. This follows from the plain meaning of 'exclusive'");

City of Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453, 470-71 (1906) ("The term 'exclusive' is so plain that little additional light can be gained by resort to the lexicons. If we turn to the Century dictionary we find it defined to mean 'Appertaining to the subject alone; not including, admitting, or pertaining to any other or others; undivided; sole: as, an exclusive right or privilege; exclusive jurisdiction.'"); *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 795 (2009) (Congress's intent to make a remedy exclusive bars other remedies, such as 42 U.S.C. § 1983).

Second, the statute uses the word "any" to introduce the category of actions precluded by Congress. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)); *see also, e.g., Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980) (refusing to limit scope of "any other final action" in construing Clean Air Act); *Salinas v. United States*, 522 U.S. 52, 57 (1997) ("the word 'any' ... undercuts the attempt to impose [a] narrowing construction"). Indeed, this Court recently recognized in construing a different provision of the FTCA that "Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer'" to express its intent to cover all officers "without limitation." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221 (2008).

Third, the text makes clear that the precluded actions need not be similar to the FTCA tort remedy

against the United States that § 233(a) permits. The term "other" indicates that the immunity covers something that is "different" or distinct. *American Heritage Dictionary* 1246 (4th ed. 2000). To fall within the immunity granted by § 233(a), an "other" action need only arise "by reason of the same subject-matter" – a reference to the operative facts of a lawsuit, not the theory of liability or cause of action. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

In this respect, the immunity provided by § 233(a) has the same breadth as the FTCA's "Judgment as bar" provision, which states that a judgment against the United States on an FTCA claim "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. Consistent with the plain language of that section, the courts of appeals have uniformly concluded that § 2676 precludes a *Bivens* claim against a government employee when a judgment has been entered on a FTCA claim "arising out of the same actions, transactions, or occurrences." *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir. 2005).[7]

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[7] *See also, e.g., Serra v. Pichardo*, 786 F.2d 237, 241 (6th Cir. 1986); *Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008), *cert. denied*, 2009 WL 1849812 (U.S. Nov. 9, 2009); *Rodriguez v. Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Arevalo v. Woods*, 811 F.2d 487, 489-90 (9th Cir. 1987).

The same is true under § 233(a). The phrase "any other civil action or proceeding by reason of the same subject-matter" encompasses a claim of whatever kind, whether constitutional or otherwise. Congress has forbidden all such claims against individual PHS officers and employees where the factual basis of the suit fits within the ambit of § 233(a). In such circumstances, an FTCA claim against the United States is the "exclusive" avenue of recovery.

B. The Purpose and History of § 233(a) Are Consistent with Its Unambiguous Language.

Because the text of § 233(a) "is plain and unambiguous," the statute must be applied "according to its terms." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-64 (2009); *see also, e.g., Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there .... When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete") (internal quotation marks omitted). Resort to extratextual interpretative clues is therefore inappropriate here. But even were that not so, the purpose and history of § 233(a) confirm that Congress meant what it said, and intended to bar any claim – including a *Bivens* claim – against PHS personnel in these circumstances.

Congress passed the Emergency Health Personnel Act of 1970 to "alleviate some of the more acute problems arising out of critical shortages of

physicians and other health personnel in certain areas of the United States." H.R. Rep. No. 91-1662, at 2 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5775, 5776. The House of Representatives added § 233 to the bill at the direct request of the Surgeon General, in order to protect PHS personnel who, in light of their low salaries, could not afford the cost of liability insurance. *See* 116 Cong. Rec. 42,543 (1970) (Statement of Rep. Staggers, House sponsor); *id.* at 42,977 (Sen. Javits) (PHS workers "just could not afford to take out the customary liability insurance"). Congress viewed that immunity from personal liability as a part of the critical effort to "deliver[] health care to areas in dire need of health manpower." *Id.*; *see also Cuoco*, 222 F.3d at 108 (explaining that immunity under § 233(a) "may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order to better serve, among others, federal prisoners"). The statutory purpose of barring personal liability against PHS employees to improve their recruitment applies with full force to all forms of personal liability, including claims under *Bivens*.

In reaching the opposite conclusion, the Ninth Circuit focused on references in the floor debate to "malpractice" liability, and inferred from those that the outer limit of § 233(a)'s immunity is defined by "malpractice" and that immunity for such torts is, in turn, limited to so-called "ordinary medical malpractice actions" or professional negligence. Pet. App. 70a-72a. That is wrong on several counts. Even if "malpractice" was the form of liability

foremost on legislators' minds, that by no means limits the scope of the immunity they enacted. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"); *accord H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989). The overarching purpose of § 233(a) is consistent with immunizing PHS personnel from *any* form of personal liability for injury or death resulting from medical or related functions – and that broad immunity is what Congress actually enacted.

Moreover, even if the scope of the immunity conferred by § 233(a) were limited to "malpractice" – which it plainly is not – it would still cover *Bivens* claims arising from injury or death caused by medical or related functions. While every instance of malpractice does not rise to the level of deliberate indifference under the Constitution, acts of deliberate indifference by medical personnel do constitute malpractice – a term that (in 1970, as today) simply means conduct that amounts to "a dereliction from professional duty, whether intentional, criminal, or merely negligent, by one rendering professional services that result in injury." *Webster's Third New International Dictionary* 1368 (1961); *see also, e.g., Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994) (defining deliberate indifference as "something more than mere negligence" but "something less than acts or omissions for the very purpose of causing harm or with the knowledge that

harm will result," and equating it with "recklessness," where "a person disregards a risk of harm of which he is aware"); *Univ. Med. Ctr., Inc. v. Beglin*, No. 2007-CA-00018-MR, 2009 WL 102800, at *4-*5 (Ky. Ct. App. Jan. 16, 2009) (affirming damages for malpractice claim because of hospital's "indifference to or a reckless disregard of the health and safety of others"); *Graham v. Columbia-Presbyterian Med. Ctr.*, 588 N.Y.S.2d 2, 3 (App. Div. 1992) (allowing damages claim based on allegation that doctor's malpractice was "wanton, intentional, reckless and a departure from accepted medical practice") (internal quotation marks omitted).

The Ninth Circuit's narrow reading of § 233(a) as limited to malpractice actions likewise relied on the caption of § 233, "defense of certain malpractice and negligence suits." 84 Stat. at 1870; *see* Pet. App. 69a-70a n.12.[8] Of course, the broad scope of the immunity in § 233(a) is plain, and the caption, which does no more than "indicate the provision[] in a most general manner," cannot narrow that scope. *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947); *accord Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) ("the caption of a statute ... cannot undo or

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[8] In Title 42 of the U.S. Code, where the statute is codified, § 233 is titled "Civil actions or proceedings against commissioned officers or employees," and § 233(a) is captioned "Exclusiveness of remedy." But Title 42 has not been enacted into positive law, so this language is not operative. *See* 1 U.S.C. § 204(a) & note; *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993).

limit that which the [statute's] text makes plain") (internal quotation marks omitted); *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 482-83 (2001). But, in addition, the Ninth Circuit was mistaken in believing that the provision's caption is inconsistent with its plain language. As explained above, "malpractice" can encompass deliberate indifference in providing or withholding medical care. Indeed, if "malpractice" were necessarily synonymous with professional negligence, then the word "negligence" in the original caption of § 233, preceded by the disjunctive "or," would be entirely superfluous.

It is also significant that the caption of § 233 refers to the "*defense* of certain malpractice and negligence suits." Even under the narrowest meaning of "malpractice," that term describes the exclusive remedy that the Attorney General actually *defends* under § 233 – without narrowing the broader scope of the immunity for PHS personnel. If a PHS officer's or employee's absolute immunity attaches under § 233(a), then the suit is "deemed a tort action against the United States" under the FTCA. 42 U.S.C. § 233(b), (c). The United States "defend[s]" that FTCA suit. *Id.* § 233(b). The only question at that stage is whether the United States is liable under state law tort standards that apply to private persons. 28 U.S.C. § 1346(b); *see also FDIC v. Meyer*, 510 U.S. 471, 477 (1994). Thus, the claims the United States will ultimately have to "defend" under § 233(a) will be state law claims of malpractice or negligence. To the extent the title of the statute could possibly be read as a limitation, it would describe a limit on the plaintiff's exclusive FTCA

remedy, and not a limit on the immunity § 233(a) affords to individual PHS officers.

Nor can a limitation be read into the § 233(a) immunity based on the fact that the statute was enacted six months before *Bivens* itself was decided. *Contra* Pet. App. 19a. Section 233(a) speaks in categorical terms, providing immunity for "any" claim against PHS personnel by reason of the specified subject matter. The immunity is not limited to causes of action "heretofore existing" or "of which Congress is aware," and there is no warrant for reading such limitations into the statutory text. *See, e.g., Bates v. United States*, 522 U.S. 23, 29 (1997) (stating that this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face"). Congress's objective of improving recruitment and retention of PHS professionals by shielding them from personal liability applies with full force to all forms of liability, whether or not Congress was aware of the basis of liability or it existed when § 233(a) was enacted. Indeed, it is hard to fathom how Congress could have intended to exclude *Bivens* claims from the scope of the § 233(a) immunity *sub silentio* if Congress was entirely unaware of the possibility of such liability. Regardless, whether Congress was aware of the concept of constitutional torts or not, § 233(a) contains no such limitation. *See TVA v. Hill*, 437 U.S. 153, 185 (1978) ("It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this

case been anticipated").[9] By making the FTCA remedy "exclusive" and barring "any other civil action," Congress plainly prohibited courts from inferring new remedies in this area, as well as enforcing old ones.

That the timing of § 233(a)'s enactment relative to the *Bivens* decision is irrelevant to the statute's meaning is further confirmed by the passage five years later of the Gonzalez Act, Pub. L. No. 94-464, § 1(a), 90 Stat. 1985 (1976). The Gonzalez Act makes an FTCA action against the United States "exclusive of any other civil action or proceeding by reason of the same subject matter" brought against medical personnel in the armed forces and based on a "negligent or wrongful act or omission." 10 U.S.C. § 1089. Congress borrowed the key exclusionary language of the Gonzalez Act directly from the text of § 233(a). *See* S. Rep. No. 94-1264, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 4443, 4450 ("legislation having a comparable effect presently exists for ... medical personnel of the ... Public Health Service"). Despite the intervening decision in *Bivens*, Congress did not include a *Bivens* exception in the Gonzalez Act – let alone amend § 233 to add

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[9] Congress had reason to be aware. Long before *Bivens*, the Court noted that federal employees were subject to injunctive relief for constitutional violations, and stated that whether damages were likewise recoverable was an issue with "sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see also Jacobs v. United States*, 290 U.S. 13, 16 (1933) (implying a private right of action for damages against United States for constitutional violation and stating that "[s]tatutory recognition was not necessary").

one, even though it contemplated that provision anew.[10] Rather, Congress expressed its intent that the protection of the Gonzalez Act – and its language identical to that of § 233(a) – "cover all potential liability." *Id.* at 2, *as reprinted in* 1976 U.S.C.C.A.N. at 4444. There is thus absolutely no reason to believe that if Congress had only known about *Bivens* it would have written § 233(a) more narrowly. In both statutes, Congress expressed special solicitude for federal medical workers – who are acutely necessary and acutely vulnerable to suit – and shielded them from all claims, whether common law, statutory, or constitutional.[11]

C. The Express Constitutional Claim Exception in the Westfall Act Confirms That No Such Exception Exists in § 233(a).

The Westfall Act, the name commonly used to refer to 28 U.S.C. § 2679(b), further confirms that if Congress had intended the immunity created by

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[10] Notably, Congress has amended § 233 in various ways on numerous occasions since *Bivens* was decided, but has never at any time suggested the existence of a *Bivens* exception to the § 233(a) immunity. *See, e.g.*, Pub. L. No. 102-501, §§ 2 to 4, 106 Stat. 3268, 3268-71 (1992); Pub. L. No. 104-191, Title I, § 194, 110 Stat. 1936, 1988 (1996); Pub. L. No. 107-296, Title III, § 304(c), 116 Stat. 2135, 2165 (2002).

[11] Congress has also accorded analogous protections to other groups. *See, e.g.*, 22 U.S.C. § 2702 (medical or supporting personnel of the Department of State); 38 U.S.C. § 7316 (health care employees of the Department of Veterans Affairs); 42 U.S.C. § 2458a (medical or supporting personnel of NASA); 42 U.S.C. § 5055 (medical or supporting personnel acting as volunteers in various domestic volunteer services programs).

§ 233(a) to have an exception for *Bivens* claims, it would have said so expressly. The Westfall Act was enacted in 1988 to override this Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that federal employees' judge-made absolute immunity to state law tort claims applied in only limited circumstances. *See* H.R. Rep. No. 100-700, at 2 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5946. In paragraph (1) of the Westfall Act, Congress provided that the FTCA remedy against the United States for an injury "arising or resulting from [a] negligent or wrongful act or omission" by a federal employee is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. § 2679(b)(1). But Congress then went on in paragraph (2) of the Westfall Act to expressly except *Bivens* claims from the immunity created by paragraph (1). *Id.* § 2679(b)(2) ("Paragraph (1) does not extend or apply to a civil action against an employee of the Government ... which is brought for a violation of the Constitution of the United States").

Given the inclusion of an express exception for *Bivens* claims in the Westfall Act, but not in § 233(a), no constitutional tort exception can be read into the latter statute. As this Court has previously observed, when Congress passed the Westfall Act it "clearly was aware of" statutes, including § 233(a), providing special statutory immunity to certain federal employees. *United States v. Smith*, 499 U.S. 160, 173 (1991) (citing H.R. Rep. No. 100-700, at 4). Thus, Congress could have and would have amended

§ 233(a) at that time to include a similar express exception for *Bivens* had it intended such an exception. But Congress pointedly chose to leave § 233(a) untouched. "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted). Congress made it clear that in the absence of an express exemption, constitutional claims fall within the scope of the phrase "any other civil action or proceeding ... by reason of the same subject matter" – a phrase that appears in both § 233(a) and the Westfall Act. The courts below erred by reading into § 233(a) the very limitation that Congress declined to adopt.

Section 233(a) and the Westfall Act afford PHS officers and employees two separate immunities from suit, which overlap but are not coextensive. *See Smith*, 499 U.S. at 170-73 (holding that federal employees covered by a specific immunity statute such as § 233(a) are afforded protection *both* by that statute and by the Westfall Act). Section 233(a) provides PHS personnel with immunity from any form of liability for specified subject matter, namely personal injury or death resulting from the performance of medical or related functions in the scope of their employment. In contrast, the Westfall Act gives all federal employees, including PHS personnel, immunity for any kind of function within the scope of their employment, but excepts some particular forms of liability, namely liability based on constitutional or certain statutory claims. *See* 28

U.S.C. § 2679(b)(1), (2). Thus, by enacting and not repealing § 233(a), Congress has chosen to give Public Health officers an extra layer of protection from suit as compared to most other federal employees. *See also supra* at 33-34 & note 11 (citing similar statutes for certain other federal employees).

The district court, asserting that it was following the "statutory trail," Pet. App. 59a, concluded that § 233(a) actually "incorporates the provision of the FTCA which explicitly preserves a plaintiff's right to bring a *Bivens* action," *i.e.*, the Westfall Act exception. Pet. App. 61a. The court reached that surprising conclusion by observing that § 233(a) includes a cross-reference to 28 U.S.C. § 1346(b), which allows FTCA claims against the United States "[s]ubject to the provisions of chapter 171 of this Title." And chapter 171 includes 28 U.S.C. § 2679(b), the Westfall Act. The district court therefore concluded that the constitutional tort exception of paragraph (2) of the Westfall Act applies not just to the immunity created by paragraph (1) of the same Act, but also to the immunity created by § 233(a).[12]

That is a patent misreading of the statutory language. Section 233(a) refers to the FTCA only in describing the scope of a plaintiff's remedy against the United States – not in describing the scope of the immunity afforded to PHS employees. 42 U.S.C. § 233(a) (stating that "[t]he remedy against the United States provided by sections 1346(b) and 2672 of title 28 ... shall be exclusive"). The "statutory

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[12] The Ninth Circuit declined to address this reasoning by the district court. Pet. App. 40a.

trail" thus simply fails to connect the Westfall Act exception to the language of § 233(a) conferring immunity on individual officers, much less to explicitly carve out *Bivens* claims from the protection those officers are afforded. Moreover, the exception in the Westfall Act, by its own terms, applies *only* to the specific immunity set forth in "Paragraph (1)" of the Westfall Act itself. 28 U.S.C. § 2679(b)(2)(A). It says nothing about the reach of the preexisting grant of immunity set forth in § 233(a), which has different language and a different scope.

Pointing to *United States v. Smith*, Respondents have contended that because the Westfall Act applies to all federal employees, it effectively nullifies the earlier-enacted § 233(a). Pet. Opp. 30-31. But this strained reading of *Smith* bears no resemblance to what the Court actually said in that case. *Smith* held that the FTCA provides statutory immunity for all federal employees acting in the scope of their employment, but explained that this did not constitute an implied repeal of preexisting immunity statutes because the FTCA simply "*add[ed]* to what Congress created" in the earlier statute. *Smith*, 499 U.S. at 172. Nothing in the text of the Westfall Act or this Court's decision in *Smith* suggests that the Act implicitly repealed or subtracted from the special protections previously afforded to certain specific classes of federal employees, such as PHS personnel. *See id.* at 170-73; *cf. Wyeth v. Levine*, 129 S. Ct. 1187, 1202 (2009) (concluding that consumer-safety statute served as a floor but not a ceiling preempting more protective state laws).

Indeed, reading the Westfall Act in that way would contravene the rule that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks omitted); *see also Morton v. Mancari*, 417 U.S. 535, 550 (1974). That rule has particular force where, as here, the earlier statute is more specific and targeted than the later-enacted one. In such circumstances, "'a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, (1976)); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

In a variation on the theme of reading the Westfall Act exception into § 233(a), the Ninth Circuit treated the legislative history of the Westfall Act as indirect evidence that § 233(a) itself contains a similar exception (even though it does not say so). It should be clear at the outset that such reasoning is doomed to fail, regardless of what the Westfall Act's legislative history actually says. The Westfall Act includes an express constitutional tort exception, whereas § 233(a) does not. Therefore, there is no such exception to the § 233(a) immunity. Given that textual reality, statements in the legislative history of the later-enacted statute have little (if any) relevance for the meaning of the earlier one. *See Jones v. United States*, 526 U.S. 227, 238 (1999)

("subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress") (internal quotation marks omitted); *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history ... should not be taken seriously, not even in a footnote").

Even if it were entitled to any weight, the Westfall Act's legislative history does not support the Ninth Circuit's reading of § 233(a). The court pointed to generalized statements to the effect that the Westfall Act immunity was intended to be similar to the various more specific statutory grants of immunity that already existed. Pet. App. 26a-28a. But that by no means implies that Congress considered § 233(a) and the Westfall Act to be exactly coextensive, even though the Westfall Act has an express exception permitting *Bivens* claims and § 233(a) does not. Rather, Congress's purpose in enacting the Westfall Act was restore the status quo ante that existed prior to this Court's *Westfall* decision – a state of affairs in which PHS personnel enjoyed a special immunity that most other federal employees did not.

Before the *Westfall* decision, most federal employees were protected only by the judicially created immunity doctrines articulated in *Barr v. Matteo*, 360 U.S. 564 (1959), which was understood as providing absolute immunity from state law tort claims, and *Butz v. Economou*, 438 U.S. 478 (1978), which provided qualified immunity from constitutional claims. Only certain specific groups of

federal employees, including PHS officers and employees, were afforded complete immunity by statute. *See Smith*, 499 U.S. at 170 n.11. Then, in *Westfall*, the Court held that *Barr*'s absolute immunity to state law tort claims extended only to federal employees performing discretionary functions. 484 U.S. at 299. The manifest intent of Congress in the Westfall Act was to undo that decision. H.R. Rep. No. 100-700, at 2, *as reprinted in* 1988 U.S.C.C.A.N. at 5946. Thus, Congress restored federal employees' absolute immunity from state law claims, but did not extend that immunity to preclude constitutional tort claims. After all, under *Butz*, most federal employees had previously enjoyed only qualified immunity to constitutional tort claims, not absolute immunity. But there is no indication that in restoring the prior state of affairs, Congress intended to level all other preexisting statutory immunities to the extent they were broader than the immunity provided by the Westfall Act itself. Indeed, the House Report declared that the Westfall Act would not "expand or diminish rights established under other Federal statutes." H.R. Rep. No. 100-700, at 7, *as reprinted in* 1988 U.S.C.C.A.N. at 5951.

In short, both before and after the Westfall Act, Congress provided Public Health Service officers and employees with an additional statutory immunity that does not extend to the bulk of the federal workforce. The Ninth Circuit viewed that distinction as "arbitrary," Pet. App. 34a, but Congress certainly did not think it was an arbitrary distinction when it enacted § 233(a) in 1970, or declined to amend that provision in a limiting fashion in later years.

Congress can always revise its judgment in the future. But it is not the role of the courts to enact a judicial repeal based on a policy disagreement with Congress's decision to "immuniz[e] one set of doctors ... and leav[e] the rest on the hook." Pet. App. 34a.

II. The Court's *Bivens* Jurisprudence Requires Adherence To The Plain Language of § 233(a).

As demonstrated in Part I, in § 233(a) Congress expressly and unambiguously barred *Bivens* claims against Petitioners and declared that FTCA claims against the United States are the sole and exclusive remedy available here. This Court's decisions require adherence to that congressional command. First, the Court has consistently recognized that *Bivens* claims may not proceed where Congress has expressly declared another remedy to be exclusive. Second, such an express congressional declaration must be given effect, whether or not a court deems the alternative statutory remedy to be "equally effective" as a judicially created *Bivens* action. Third, the Court's "special factors" cases drive home that Congress, not the judiciary, has the primary competence to determine the kind of remedy that is most appropriate for any alleged wrong. Fourth, though not equivalent to a *Bivens* remedy against individual PHS personnel, the alternative FTCA remedy mandated by Congress provides robust relief, which obviates any need to decide the question whether Congress could foreclose *all* relief for an alleged constitutional violation in this context.

A. Congress May Bar *Bivens* Actions by Declaring Another Remedy Exclusive.

For as long as the *Bivens* doctrine has existed, this Court has recognized that the availability of a *Bivens* remedy is first and foremost a question of Congress's intent. As Justice Stevens explained for a unanimous Court more than 25 years ago, when Congress "provides an alternative remedy" and has "indicated its intent" that the remedy be exclusive, "the Court's power [to create a *Bivens* remedy] should not be exercised." *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *see also Wilkie v Robbins*, 551 U.S. 537, 554 (2007) (describing threshold inquiry as whether "Congress expected the Judiciary to stay its *Bivens* hand"). Thus, the Court has consistently recognized that a *Bivens* action will be foreclosed by an "explicit congressional declaration that persons injured by a federal officer's violation of the [Constitution] may not recover money damages from the [officer], but must instead be remitted to another remedy." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971); *see also, e.g., Bush*, 462 U.S at 373 (recognizing that Congress may "expressly preclude[] the creation of [a *Bivens*] remedy by declaring that existing statutes provide the exclusive mode of redress"); *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (emphasizing that *Bivens* claims have been allowed only where there was "no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy").

Although this congressional power has consistently been recognized, in no prior *Bivens* case

has this Court been met with any kind of express congressional declaration that another remedy is exclusive. Thus, until now, the Court has always had to decide whether to exercise its "power to grant relief that is not expressly authorized by statute," mindful "that such power is to be exercised in the light of relevant policy determinations made by the Congress," *Bush*, 462 U.S. at 373, but without the guidance of an express declaration by Congress.

By these lights, § 233(a) presents an easier case than any other *Bivens* question this Court has previously considered, because Congress has expressly and unambiguously declared the FTCA remedy "exclusive" and barred "any other civil action" against the federal officers "by reason of the same subject-matter." Congress has spoken directly to the issue, and there is nothing more for the courts to do but enforce Congress's determination.

Yet, astonishingly, the Ninth Circuit found Congress's express statement not to be express enough. It focused on a stray dictum from this Court's nearly 30-year-old decision in *Carlson v. Green*, 446 U.S. 14 (1980), asking whether Congress had "explicitly declared [the FTCA] to be a *substitute* for recovery directly under the Constitution." *Id.* at 18-19. The court of appeals seemed to believe that this formulation in *Carlson* permitted it to disregard the plain language of § 233(a), on the grounds that the statute does not specifically mention constitutional claims, was enacted before *Bivens* was decided, has legislative history indicating that some members of Congress were particularly concerned with "malpractice" liability, and resulted in a special

immunity for PHS personnel that the court found "arbitrary." Pet. App. 18a-35a.

As demonstrated in Part I, none of these considerations remotely undermines the plain language of § 233(a) that makes the FTCA remedy exclusive in this context, and neither *Carlson* nor any other *Bivens* case warrants departure from that plain statutory text. Indeed, *Carlson* took pains to emphasize that Congress did not need to "recite[] any specific 'magic words'" to bar *Bivens* actions. 446 U.S. at 19 n.5. In this sphere, as in others, the "policy determinations made by the Congress" are paramount. *Bush*, 462 U.S. at 373. That requires adherence to the plain meaning of an exclusive remedy statute.

Thus, *Carlson* does not and could not stand for the proposition that an exclusive remedy statute will bar *Bivens* claims only if the statute was enacted after *Bivens* and specifically refers to constitutional claims. There is no need, however, to surmise what the *Carlson* Court would have thought about § 233(a), because it expressly cited that section as an example of a statute that explicitly states an exclusive remedy, *in contrast to* the FTCA's general provisions. As the Court explained, its "conclusion" that "Congress views FTCA and *Bivens* as parallel, complementary causes of action" under the circumstances there was "buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. *See* ... 42 U.S.C. § 233(a) ... (malpractice by certain Government health personnel)." *Carlson*, 446 U.S. at 19. In short,

Carlson held up § 233(a) as a paragon of a statute that forecloses *Bivens* relief.[13] By declaring that the FTCA excludes all personal liability in this context, § 233(a) provides an explicit statement that the FTCA is a "substitute" for constitutional claims. It does not matter whether Congress specifically mentioned such claims, or even thought about them. It is enough that Congress expressly foreclosed "any other" claim, aside from the FTCA remedy.

Post-*Carlson* decisions drive the point home. In *Bush*, the Court emphasized that Congress can "expressly preclude[] the creation of [a *Bivens*] remedy by declaring that existing statutes provide the *exclusive* mode of redress." 462 U.S. at 373 (emphasis added); *id.* at 377-78 (observing that in *Carlson*, "there was no congressional determination foreclosing the damages claim and making the Federal Tort Claims Act exclusive"). Similarly, in *Schweiker*, the Court indicated that a *Bivens* action is permissible only when there is "no *exclusive* statutory alternative remedy." 487 U.S. at 421 (emphasis added). Section 233(a) is just such an exclusive remedy statute.

Indeed, post-*Carlson* cases have recognized that Congress may indicate its intent to provide an exclusive remedy without making any express

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[13] According to the Ninth Circuit, *Carlson*'s parenthetical reference to "malpractice" in connection with § 233(a) shows that *Carlson* regarded § 233(a) as precluding only medical malpractice claims. Pet. App. 35a-36a. That is a plain misreading of the passage in *Carlson*. In any event, "malpractice" also covers constitutional claims in this context. *See supra* at 28-32.

statement at all. For example, in *Bush*, handed down just three years after *Carlson*, the Court thought it "clear" that Congress may "indicate its intent [to make a remedy exclusive] by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself." 462 U.S. at 378. And in *Wilkie*, the Court pointed to *Bush* and *Schweiker* as cases where Congress's intent to preclude *Bivens* remedies was clear from the mere fact that it had created "an elaborate remedial scheme" or had "chose[n] specific forms and levels of protection" through an alternative remedy. 551 U.S. at 554 (citing *Bush*, 462 U.S. at 388, and *Schweiker*, 487 U.S. at 426) (internal quotation marks omitted). If Congress can displace *Bivens* simply by enacting an alternative remedy, it can certainly do so by enacting an express statement that a remedy is "exclusive."

B. Congress May Bar *Bivens* Actions Through an Exclusive Remedy That Is Not "Equally Effective."

The Ninth Circuit also believed that § 233(a) does not bar *Bivens* claims because the exclusive FTCA remedy against the United States allowed by § 233(a) is not "equally effective" as a *Bivens* suit against individual federal employees. Pet. App. 10a. That was error because where, as here, Congress has expressly precluded *Bivens* actions in favor of an alternative remedy, Congress's command must be given effect whether or not the alternative remedy is "equally effective."

Here again, the Ninth Circuit derived its test from the language in *Carlson* stating that *Bivens* actions are precluded when "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution *and viewed as equally effective*." *Carlson*, 446 U.S. at 18-19 (emphasis added); *see also Bivens*, 403 U.S. at 397; Pet. App. 10a. Notwithstanding that formulation, there is no "equally effective" test that an express exclusivity statute must satisfy before it will be given effect. As explained above, in this field Congress's policy judgments are paramount. Accordingly, this Court has held time and again that Congress may supplant *Bivens* with an alternative remedy that is *less* effective – even in the absence of an express exclusivity provision. *A fortiori*, courts must defer to Congress's expressly stated judgment to substitute a less effective remedy for *Bivens*.[14]

As previously observed, in *Carlson* there was no explicit statutory statement making the FTCA remedy exclusive. The Court has therefore recognized that the language in *Carlson* relied on by the court below (and similar language in *Bivens*) is "dictum." *United States v. Stanley*, 483 U.S. 669, 678-79 (1987). Despite its phrasing, that dictum cannot be understood as imposing a conjunctive two-pronged test for explicit exclusivity provisions, as the

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[14] As discussed below, the FTCA is clearly a substantial remedy, so this case does not present the question whether Congress could choose to bar all meaningful remedies for an alleged constitutional violation in this context. *See infra* at 54-57.

Ninth Circuit believed. Rather, *Carlson* was identifying two disjunctive means of discerning Congress's intent to supplant *Bivens* with another remedy, either of which is sufficient: either an express exclusivity statement, *or* the creation of an alternative remedy that Congress viewed as equally effective as *Bivens*. That much is clear from how *Carlson* described its own side-by-side comparison of the effectiveness of the two remedies: "Four additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also *support* our conclusion *that Congress did not intend* to limit respondent to an FTCA action." 446 U.S. at 20-21 (emphasis added).

In other words, the "equally effective" inquiry is a means of ascertaining and effectuating Congress's intent – not overriding that intent. Where, as here, Congress has expressly declared a remedy to be exclusive, no further evidence of intent is needed. Not surprisingly, then, *Bush* made clear that the *Carlson* language should be read as a disjunctive test of congressional intent: "Congress has not resolved the question presented by this case by expressly denying petitioner the judicial remedy he seeks *or* by providing him with an equally effective substitute." 462 U.S. at 378 (emphasis added); *see also Carlson*, 446 U.S. at 27 (Powell, J., concurring in the judgment) ("The Court does implicitly acknowledge that Congress possesses the power to enact *adequate* alternative remedies that would be exclusive").

Since *Carlson*, this Court has emphasized that a *Bivens* remedy is not available every time "a federal right has been violated and Congress has provided a

less than complete remedy for the wrong." *Bush*, 462 U.S. at 373; *see also Schweiker*, 487 U.S. at 421-22 (recognizing that the "absence of statutory relief for a constitutional violation ... does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation"). Accordingly, the Court has repeatedly found *Bivens* remedies precluded even where a statutory remedy was concededly not as effective as *Bivens*. For example, *Bush* denied a *Bivens* remedy, but recognized that the remedies provided by the civil service statutes and regulations "were not as effective as an individual damages remedy" and "did not fully compensate [the plaintiff] for the harm he suffered." *Id.* at 372; *see also Schweiker*, 487 U.S. at 425 (declining to imply a *Bivens* remedy despite finding that "Congress ha[d] failed to provide for 'complete relief'" to plaintiffs); *Wilkie*, 551 U.S. at 576 (recognizing that plaintiff's "piecemeal" remedy would not afford relief equivalent to *Bivens* action). Given that none of these cases involved a statute that expressly declared a remedy to be exclusive, it would make little to sense to say that Congress may preclude a *Bivens* remedy with a lesser one where it fails to state that the alternative remedy is exclusive, but not where it does make such a statement.[15]

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[15] The Ninth Circuit distinguished the holdings in *Schweiker* and *Bush* on the ground that "those subsequently examined schemes, however otherwise undercompensatory, nonetheless provided a uniform remedy across the United States." Pet. App. 18a. *Carlson* itself, however, readily conceded that Congress's remedy need not be "uniform" across the States where a "contrary congressional resolution" exists. 446 U.S. at 23.

In short, the "equally effective" analysis is, at most, a means of determining Congress's intent. It cannot be used to override an intent that, as here, is plainly stated in the statutory text.

C. The Court's "Special Factors" Cases Also Underscore the Deference Due to Congress.

The deference due to Congress in determining the remedies and relief available for any given injury is also emphasized by this Court's "special factors" decisions. When Congress's intent concerning the availability of a *Bivens* remedy is unclear, the Court looks to "special factors counseling hesitation before authorizing a new type of federal litigation." *Wilkie*, 551 U.S. at 550 (internal quotation marks omitted); *accord Schweiker*, 487 U.S. at 421; *Bush*, 462 U.S. at 378. In this context, the Court has frequently emphasized the need to "'respond[] cautiously to suggestions that *Bivens* remedies be extended into new contexts'" where it is unclear that Congress intended a judicially created remedy to be tacked on to the statutory one it created. *Meyer*, 510 U.S. at 484 (quoting *Schweiker*, 487 U.S. at 421).

Because Congress expressly made the FTCA remedy against the United States exclusive in the circumstances presented here, there is no need to consult such "special factors" in this case. Nonetheless, the Court's decisions addressing such special factors confirm that the exclusive remedy mandated in § 233(a) must be enforced according to its terms to bar *Bivens* claims against Petitioners. This Court has in the past found that the following

are "special factors" that operate to preclude a *Bivens* remedy: (1) "Congress' institutional competence in crafting appropriate relief," *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001); (2) "allowing Congress to prescribe the scope of relief," *Bush*, 462 U.S. at 380; and (3) "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," *Schweiker*, 487 U.S. at 423. Each of these factors reflects a recognition that Congress is in a better position to make these remedial decisions than courts. *A fortiori*, the Court's decisions require adherence to statutory provisions like § 233(a) that expressly make an alternative remedy exclusive.

That could not be more clear in the present case. Congress passed a statute to solve a problem: how to reinvigorate the PHS and attract professionals to work for the Service in underserved areas. In doing so, it made a congressional determination that these individuals should be personally immune from suit arising from their service, lest the threat of liability undermine recruitment and retention. And Congress was explicit about the remedy it meant to provide. This Court must "allow[] Congress to prescribe the scope of relief," *Bush*, 462 U.S. at 380, defer to "Congress' institutional competence in crafting appropriate relief," *Malesko*, 534 U.S. at 68, and recognize that "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course

of" medical and related functions performed by PHS personnel, *Schweiker*, 487 U.S. at 423. Every one of these special factors precludes the imposition of a *Bivens* remedy here.

In addition, the Court has previously recognized the imperative to defer to precisely the kind of judgment Congress made here when it barred personal liability to enhance recruitment and retention of qualified PHS officers and employees. As the Court stated in *Schweiker*, "[t]he prospect of personal liability for official acts ... would undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established." 487 U.S. at 425.

The Ninth Circuit rejected the existence of special factors because *Carlson* held that there were no such factors in the circumstances presented in that case. Pet. App. 38a. But that ignores the key and dispositive difference between this case and *Carlson*: § 233(a) mandates that the FTCA remedy is exclusive, whereas no statute made the FTCA remedy exclusive for the subject matter at issue in *Carlson*. In addition, the Ninth Circuit ruled out special factors here because the FTCA incorporates state law remedies, and opined that "a remedial scheme that is entirely parasitic on state law" cannot "be a substitute for a *Bivens* remedy." Pet. App. 39a. But § 233(a) shows that Congress reached the opposite conclusion. The Court's special factors cases teach that Congress's judgment, not the Ninth Circuit's, is controlling here.

D. The FTCA Provides a Robust Remedy for Injury or Death Resulting from PHS Care.

In § 233(a), Congress did not merely preclude *Bivens* and other actions against PHS personnel in their individual capacities. It also offered an alternative and substantial remedy: an FTCA suit against the United States. Thus, this case does not present the question whether Congress may eliminate all remedies for alleged unconstitutional conduct in this context. It has not done so.

As demonstrated above, this Court has firmly rejected the notion that the judge-made *Bivens* remedy must be available unless Congress creates an alternative that is "equally effective." Some decisions have suggested, however, that any alternative remedy should be "meaningful" or "adequate," even if it is decidedly less generous than *Bivens*. *See Bush*, 462 U.S. at 372, 378 n.14; *Schweiker*, 487 U.S. at 423-24; *Wilkie*, 551 U.S. at 553; *cf. Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability").

On the other hand, the Court has rejected the notion that there must be a remedy for every constitutional violation in every context. In *Stanley*, the Court stated that "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley, or any other particular serviceman, an 'adequate' federal remedy for his injuries." 483 U.S. at 683; *see also Malesko*, 534 U.S.

at 69 (observing that the Court has "rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court").

The Court need not address that issue in this case because the FTCA remedy provided by Congress is plainly adequate and meaningful. Through the FTCA, the United States has assumed liability for tortious conduct by its employees within the scope of their employment on the same basis as a private person under state law. 28 U.S.C. §§ 1346(b), 2674. For the medical and related functions within the ambit of § 233(a), that means the United States affords a remedy to any person injured by care that falls below the stringent standards imposed by state professional malpractice laws, which would typically allow recovery against the United States for mere negligence by PHS personnel. Thus, in most cases, the alternative remedy provided by Congress will be far more generous than remedies limited to constitutional violations, which in this context would require proof of deliberate indifference. Indeed, in this case the United States has conceded liability by admitting negligence and causation. J.A. 328-29. Moreover, the United States is certain to be able to satisfy judgments against it, which ensures that injured parties will obtain real relief. In contrast, personal liability claims against federal employees might afford no relief in practice if modestly remunerated employees are judgment-proof.

Thus, the remedy available to Respondents affords them the same compensatory relief as is available to any other person in the State of

California, guaranteed by the Untied States.[16] That is necessarily adequate and meaningful.[17]

Given the availability of the FTCA remedy, it is irrelevant that the law provides no additional or separate relief for alleged constitutional violations, above and beyond what is afforded under state tort law. In *Schweiker*, this Court rejected the idea that a *Bivens* remedy must be available in order to provide "compensation for the constitutional violation itself, while these respondents have merely received that to which they would have been entitled had there been no constitutional violation." 487 U.S. at 427; *see also id.* (observing that *Bush* found alternative remedy adequate even though "civil service employees would get 'precisely the same thing whether or not they were victims of constitutional deprivation'"). Hence, "the presence of

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[16] In contrast to compensatory relief, punitive damages are not available against the United States under the FTCA. 28 U.S.C. § 2674.

[17] Under California law, non-economic damages of up to $250,000 are available for claims alleging wrongful death or injury from medical negligence. *See* Cal. Civ. Code § 3333.2. This $250,000 cap does not apply to economic damages. *Fein v. Permanente Med. Group*, 695 P.2d 665, 680 (Cal. 1985). Moreover, even with respect to non-economic harm, California courts have held that the cap is inapplicable when the medical malfeasance is based on more than mere negligence, at least in certain circumstances. *See Perry v. Shaw*, 106 Cal. Rptr. 2d 70, 77-78 (Cal. Ct. App. 2001). Thus, even under the state law remedies incorporated by the FTCA, Respondents might be entitled to additional non-economic damages if they prove that the tortious conduct here was not merely negligent, but rose to the level of "deliberate indifference."

alleged unconstitutional conduct that is not *separately* remedied under" the FTCA does not "imply that the statute has provided 'no remedy' for the constitutional wrong at issue." *Schweiker*, 487 U.S. at 427-28 (emphasis in original).

In short, this Court does not face a situation as in *Bivens* itself or *Davis v. Passman*, 442 U.S. 228 (1979), where the failure to imply a remedy for a constitutional wrong would leave the plaintiff with no redress at all. Rather, the Court faces a situation in which there is an adequate remedy that Congress has explicitly declared to be "exclusive of any other." The Court's summation in *Schweiker* applies with equal force here:

> Nor would we care to "trivialize" the nature of the wrongs alleged in this case. Congress, however, has addressed the problems created by [deficient PHS medical care]. Whether or not we believe that its response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a [public health program]. Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision.

487 U.S. at 429 (citation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case remanded with directions to dismiss the claims against Petitioners.

Respectfully submitted,

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APPENDIX

10 U.S.C. § 1089

§ 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against

any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f)(1) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's

fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term "head of the agency concerned" means--

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Armed Forces Retirement Home Board, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

28 U.S.C. § 1346

§ 1346. United States as defendant

* * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for

injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * * *

28 U.S.C. § 2672

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law

of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency.

Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2676

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2679

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within

the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed

without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding

in the manner provided in section 2677, and with the same effect.

42 U.S.C. § 233

§ 233. Civil actions or proceedings against commissioned officers or employees

(a) Exclusiveness of remedy

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

(b) Attorney General to defend action or proceeding; delivery of process to designated official; furnishing of copies of pleading and process to United States attorney, Attorney General, and Secretary

The Attorney General shall defend any civil action or proceeding brought in any court against any person

referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Removal to United States district court; procedure; proceeding upon removal deemed a tort action against United States; hearing on motion to remand to determine availability of remedy against United States; remand to State court or dismissal

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by

suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court: Provided, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

(d) Compromise or settlement of claim by Attorney General

The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28 and with the same effect.

(e) Assault or battery

For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

(f) Authority of Secretary or designee to hold harmless or provide liability insurance for assigned or detailed employees

The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to a State or political subdivision thereof or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury.

* * * *

[Subsections (g) through (p) of Section 233 are omitted. These subsections relate to Section 233's applicability to individuals and entities neither directly employed by nor part of the PHS, but nonetheless deemed PHS employees for purposes of Section 233.]

PETITIONER'S BRIEF

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ESTHER HUI, ET AL.,

Petitioners,

v.

YANIRA CASTANEDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER ESTHER HUI

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a) make the Federal Tort Claims Act the exclusive remedy for claims arising from medical care and related functions provided by Public Health Service personnel, thus barring *Bivens* actions?

PARTIES TO THE PROCEEDING

The petitioners here and appellants below are United States Public Health Service Officers or Employees Esther Hui and Commander Stephen Gonsalves.

Petitioners and appellants below Eugene Migliaccio, Chris Henneford and Timothy Shack were dismissed as defendants by plaintiffs and dismissed as petitioners pursuant to stipulation of the parties.

Respondent Yanira Castaneda is the personal representative of the estate of Francisco Castaneda. Respondent Vanessa Castaneda is the beneficiary of the estate, by and through her mother and guardian Lucia Pelayo.

The United States of America, George Molinar, Daniel Hunting, Susan Pasha, and Robert Mekemson are defendants in the district court but were not parties to the appeal. The United States was an *amicus* in the court of appeals.

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BRIEF FOR PETITIONER ESTHER HUI

Petitioner Esther Hui respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion below (Pet. App. 1a) is reported at 546 F.3d 682. The decision of the district court (Pet. App. 41a) is reported at 538 F. Supp. 2d 1279.

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on October 2, 2008. A timely petition for rehearing en banc was denied on January 29, 2009. Pet. App. 81a. On April 10, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to May 29, 2009. On May 19, 2009, he further extended the time until June 12, 2009. A timely petition for writ of certiorari was filed on June 11, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioners claim immunity from the *Bivens* action brought by respondents pursuant to 42 U.S.C. § 233(a), which provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 . . . for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

STATEMENT OF THE CASE

Petitioners sought dismissal of the claims brought against them by respondents under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) pursuant to section 233(a). The Ninth Circuit, however, held that section 233(a) does not preclude *Bivens* actions against PHS employees. The Ninth Circuit erred and its judgment should be reversed.

1. FACTUAL BACKGROUND

This is a damages action arising out of the medical care provided to decedent Francisco Castaneda. As currently postured before this Court, this matter involves *Bivens* claims of alleged deliberate indifference

to Castaneda's medical needs against petitioners Dr. Hui and Commander Gonsalves.[1]

From December 2005 to March 26, 2006, Castaneda, an alien, was incarcerated in state prison following a December 2005 conviction in California. While in state prison, Castaneda complained to medical staff about a lesion on his penis. The state prison medical staff recommended that Castaneda be referred to a urologist for a biopsy to rule out cancer but the biopsy was not done. J.A. 343-45.

On March 27, 2006, Castaneda was transferred to the custody of Immigration and Customs Enforcement (ICE) in San Diego while removal proceedings were pending against him. J.A. 345. Medical care for detainees at the San Diego facility was provided by the Division of Immigration Health Services (DIHS). J.A. 242. DIHS is part of the United States Public

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[1] Petitioners' motion to dismiss was directed to the original complaint. While the motion was pending, Castaneda moved for leave to file a first amended complaint. That motion was granted and the parties stipulated that the motion to dismiss could be deemed petitioners' response to the amended complaint. When the district court issued its order on the motion to dismiss, a motion for leave to file a second amended complaint was pending and was ultimately granted which substituted the current plaintiffs for Castaneda. Another stipulation to deem petitioners' motion to dismiss their response to the second amended complaint was approved by the district court. In its opinion in this case, the Ninth Circuit relied on the factual allegations in the third amended complaint which was filed on May 29, 2008. Pet. App. 3a. The current operative complaint in the district court is the fourth amended complaint.

Health Service (PHS) which is part of the Department of Health and Human Services. J.A. 22. The PHS is one of the seven uniformed services of the United States and its members may be called into military service in times of war or national emergency whereupon they would become subject to the Uniform Code of Military Justice. Pet. App. 4a-5a.

Petitioner Esther Hui, a medical doctor, was a civilian employee of the PHS at all relevant times. J.A. 23. According to plaintiff, Dr. Hui was the only physician providing medical care at the San Diego facility between June and December 2006. J.A. 366.

Upon arrival at the San Diego facility, Castaneda was seen by a physician's assistant, Lt. Anthony Walker. Based on the examination, Castaneda's complaints of a painful lesion on his penis and his family history of cancer, Lt. Walker recommended a urological consultation and a biopsy. J.A. 345-46. According to DIHS policy, non-emergent requests for consultations with outside specialists have to be approved in advance through a Treatment Authorization Request (TAR) which is sent to an off-site Managed Care Coordinator for approval. J.A. 90-92, 364-65. A TAR was submitted for a urology consult and biopsy in March 2006 and approved on May 31, 2006. J.A. 92-93.

On June 7, 2006, Castaneda was seen by Dr. John Wilkinson, an oncologist. After examining Castaneda, Dr. Wilkinson agreed that a biopsy should be done and offered to admit Castaneda to a hospital

for that purpose. According to respondents, Dr. Hui was unable to accept Dr. Wilkinson's offer to admit Castaneda for the biopsy because specific approval for an admission was required in a non-emergent situation. J.A. 367. In a note documenting her conversation with Dr. Wilkinson, Dr. Hui indicated that the biopsy was an "elective outpatient procedure." J.A. 347. According to respondents, the term "elective" is defined by DIHS as "any procedure that we have time to submit a TAR and allow for approval . . . in the sense that it is not an emergency that they will die now." J.A. 365-66. Dr. Wilkinson noted that DIHS physicians "wish to pursue outpatient biopsy which would be more cost effective." Pet. App. 5a.

Over the next few weeks, Castaneda was seen at least twice by Lt. Walker and complained that his condition was worsening. J.A. 347-48. On July 13, 2006, a TAR was submitted seeking an inpatient urology and oncology evaluation of Castaneda at a local emergency room. That TAR was approved and Castaneda was taken to the emergency room at Scripps Mercy Chula Vista where he was examined by a urologist, Dr. Daniel Hunting. Dr. Hunting determined that the lesion on Castaneda's penis was probably genital warts. He did not admit Castaneda for a biopsy but instead referred him back to his "primary treating urologist" at DIHS. Pet. App. 45a-47a.

Returned to the San Diego ICE facility, Castaneda was seen by Lt. Walker and another physician's assistant on July 17, July 26, and August 9, 2006. J.A. 351-53. On August 11, 2006, Lt. Walker submitted

a TAR requesting a biopsy and circumcision by another urologist, Dr. Masters. Castaneda saw Dr. Masters on August 22, 2006. Dr. Masters concluded that Castaneda had genital warts and recommended a circumcision which would both relieve the "ongoing medical side effects of the lesion including infection and bleeding" and provide a biopsy for further evaluation. Dr. Masters offered to admit Castaneda to the hospital to perform the circumcision but Castaneda was not admitted. Pet. App. 48a.

Castaneda was seen by a nurse or physician's assistant on August 26, 28 and September 8, 12, 14, and 26, 2006. During that time, Castaneda's condition continued to worsen with Castaneda reporting pain, discharge, foul odor and blood from the lesions on his penis. J.A. 354-56.

On October 23, 2006, Lt. Walker submitted a TAR requesting circumcision for Castaneda based on Dr. Masters' recommendation. The TAR was denied by a DIHS Staff Physician (not Dr. Hui) who stated that "circumcisions are not a covered benefit." J.A. 357.

On November 17, Castaneda was transferred to an ICE facility in San Pedro, California. J.A. 358-59. While at the San Pedro facility, Castaneda saw a private urologist who concluded that the lesion on Castaneda's penis was "most likely penile cancer" and recommended a biopsy which was approved. On February 5, 2007, prior to the scheduled biopsy,

Castaneda was released from custody. Three days later, he went to a private hospital and was diagnosed with squamous cell carcinoma. His penis was amputated and he began receiving chemotherapy. However, the cancer had metastasized and he died on February 16, 2008. Pet. App. 51a-53a.

2. PROCEEDINGS BELOW

On November 2, 2007, prior to his death, Castaneda filed a complaint in the United States District Court for the Central District of California asserting claims against the United States under the FTCA, against employees of the California Department of Corrections under 42 U.S.C. § 1983, against Dr. Hunting for negligence and against various federal officers and employees (including petitioners) under *Bivens*. Castaneda alleged that petitioners were deliberately indifferent to his serious medical needs in violation of the Fifth, Eighth, and Fourteenth Amendments to the Constitution by failing to treat his known serious medical condition and delaying or denying him access to outside medical care.

Petitioners moved to dismiss the case for lack of subject matter jurisdiction under Federal Rules of Civil Procedure, Rule 12(b)(1). Petitioners argued that they had absolute immunity from suit because section 233(a) provides that a suit under the FTCA against the United States is the exclusive remedy for any personal injury resulting from the performance of any medical or related function by PHS officers and

employees in the course and scope of their employment.

Castaneda filed a first amended complaint on February 6, 2008. J.A. 35. After his death, respondents moved for leave to file a second amended complaint to substitute Castaneda's sister and daughter as plaintiffs under survival and wrongful death theories respectively. The second amended complaint was filed on March 20, 2008. J.A. 228. The district court approved stipulations deeming the motion to dismiss to apply equally to the first and second amended complaint. The district court denied the motion to dismiss in a published opinion on March 11, 2008. Pet. App. 41a. Petitioners appealed.

On May 29, 2008, respondents filed a third amended complaint. J.A. 330. In June 2009, respondents sought leave to file a fourth amended complaint which was granted. J.A. 13-14.

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court in a published opinion filed on October 2, 2008. Pet. App. 1a. Petitioners filed petitions for rehearing en banc on November 14, 2009. The Ninth Circuit denied rehearing en banc on January 29, 2009. Pet. App. 81a.

SUMMARY OF ARGUMENT

1. In the nearly four decades since it decided *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court has made clear that *Bivens* remedies are to be considered the exception, not the rule. There is no "automatic entitlement" to pursue a *Bivens* claim, "no matter what other means there may be to vindicate a protected interest." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Further, the absence of a separate rer edy for alleged constitutional violations is not a sufficient reason to recognize a *Bivens* remedy. *Schweiker v. Chilicky*, 487 U.S. 412, 426-427 (1988).

Despite this clear statement of the law, the district court and Ninth Circuit below approached this case as if respondents had an absolute right to pursue a *Bivens* claim, absent an explicit prohibition by Congress. The correct rule, however, is the opposite. In determining whether a *Bivens* remedy will be recognized, a court must first ask "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. Even in the absence of an alternative, a court must still conclude that it is appropriate to "'authoriz[e] a new kind of federal litigation.'" *Id.* (citation omitted).

2. Congress, in 42 U.S.C. § 233(a), has provided that a claim under the FTCA is the exclusive remedy "for damage for personal injury, including death,

resulting from the performance of medical, surgical, dental, or related functions" by PHS officers and employees, precluding "any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim." Thus, the plain language of the statute precludes the prosecution of *Bivens* claims against PHS personnel related to their performance of medical and related functions. There is no ambiguity in the statute, and so, pursuant to the applicable canons of construction, that should end the analysis.

The only way to conclude otherwise is to read an exception into the statute. Virtually every court that has considered the issue has refused to find such an exception hiding in the plain language of the statute. This Court has reached that same conclusion, at least implicitly. *See Carlson v. Green,* 446 U.S. 14, 16 (1980). Congress appears content with the interpretation provided by the overwhelming majority of the courts that have addressed the issue, since it has declined to amend section 233(a) to specifically authorize *Bivens* actions despite having had eleven different opportunities to do so.

Congress's actions in regard to other legislation confirms this analysis. Congress enacted a similar exclusive remedy statute in 1988, using language almost identical to that found in section 233(a), but added a specific exception permitting the prosecution of *Bivens* claims. If Congress believed such an exception were already implicitly incorporated into the

language of section 233(a), such an explicit exception would have been unnecessary.

3. A key element of the Ninth Circuit's decision below was its conclusion that the FTCA is not as effective a remedy as a *Bivens* action and that therefore section 233(a) could not bar a plaintiff from pursuing a *Bivens* action, notwithstanding the "exclusive remedy" language in that statute. *Castaneda v. United States,* 546 F.3d 682, 689-691 (9th Cir. 2008). But it is the prerogative of Congress to determine what remedies are appropriate for a particular violation and deference to that Congressional prerogative precludes courts from substituting their views as to whether those substitute remedies are as "equally effective" as other potential remedies. Further, the reasons why the Ninth Circuit concluded that the FTCA was not as effective a remedy as a *Bivens* action primarily had to do with the limitations on damages available in a FTCA case. But this Court has repeatedly held that is not a reason to recognize a *Bivens* remedy.

4. The Ninth Circuit erred in relying on legislative history and on the title given by Congress to the statute in attempting to determine the meaning of section 233(a), because the plain language of the statute makes that meaning clear without the need to resort to such aids. Further, the Ninth Circuit misinterpreted the legislative history and the significance of the title of the statute. Contrary to the Ninth Circuit's holding, the title of the statute indicates that Congress intended section 233 to apply

to more than just common law medical negligence claims. This is supported by the legislative history as well, which indicates that Congress intended the statute to apply to any and all claims that might be made against PHS personnel relating to their performance of medical and related functions, not just to garden-variety claims of medical negligence.

5. There are special factors counseling caution against recognizing a *Bivens* remedy against PHS personnel related to their performance of medical and related functions. The low salaries paid to PHS personnel prevent them from purchasing insurance, thus exposing them to personal liability unless section 233(a) is read to preclude the prosecution of *Bivens* actions against them. This will significantly harm recruitment and retention of PHS personnel. Claims of deliberate indifference can easily be alleged even in cases of simple medical negligence, thus allowing plaintiffs in virtually every case to pursue a *Bivens* claim against PHS personnel. This will eviscerate the protection Congress intended to be provided to such individuals by section 233(a).

For all these reasons, this Court should reverse the judgment of the Ninth Circuit and order that court to reverse the decision of the district court denying petitioners' motion to dismiss and to instead order the district court to grant petitioners' motion.

ARGUMENT

1. *BIVENS* ACTIONS ARE AN EXCEPTIONAL REMEDY, NOT A RIGHT

In *Bivens*, this Court held that a direct cause of action existed for violations of the Fourth Amendment by federal agents acting under the color of their authority. 403 U.S. at 389. Both the district court and the Ninth Circuit in the opinions they issued in this action indicated that they understood *Bivens* to have created a remedy that is generally available to most alleged victims of constitutional violations. *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1286 (C.D. Cal. 2008) and *Castaneda v. United States*, 546 F.3d 682, 687 (9th Cir. 2008). This represents a fundamental misunderstanding of this Court's jurisprudence on the issue of the availability of *Bivens* actions.

> [W]e have . . . held that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.

Wilkie, 551 U.S. at 550.

In *Wilkie*, the Court noted that it had recognized *Bivens* remedies in only three instances: for violations of the Fourth Amendment, "for employment discrimination in violation of the *Due Process Clause*, and . . . for an *Eighth Amendment* violation by prison

officials," and had refused to allow such a remedy in a number of other contexts. *Id.* (citations omitted). "Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1948 (2009) (citation omitted).

In *Schweiker*, this Court refused to find that "'a *Bivens* remedy should be implied for alleged due process violations in the denial of social security disability benefits.'" 487 U.S. at 420. The Court noted that, in the three instances where *Bivens* actions were recognized, "there were no 'special factors counseling hesitation in the absence of affirmative action by Congress,' no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy." *Id.* at 421.

> Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts. The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.

Id. at 421-422.

The mere absence of a separate remedy for alleged constitutional violations is not a sufficient reason to permit a *Bivens* remedy. *Id.* at 426-427 (citing *Bush v. Lucas,* 462 U.S. 367, 390 (1983)). "*Bush* thus lends no support to the notion that

statutory violations caused by unconstitutional conduct necessarily require remedies in addition to the remedies provided generally for such statutory violations." *Id.* at 427. To the contrary, this Court concluded that merely because alleged unconstitutional conduct is not separately remedied under the statutory scheme does not imply that the statute has provided "no remedy" for the constitutional wrong at issue. *Id.* at 427-28.

The Court observed that, "[i]n the end, respondents' various arguments are rooted in their insistent and vigorous contention that they simply have not been adequately recompensed for their injuries," but the Court refused to substitute its own ideas for those of Congress as to what might be the best means of remedying the respondents' alleged injuries. *Id.* at 428-29.

This Court reached a similar conclusion in *Correctional Services Corporation v. Malesko,* 534 U.S. 61, 63 (2001), refusing to extend *Bivens* "to allow recovery against a private corporation operating a halfway house under contract with the Bureau of Prisons." The Court rejected the respondent's contention that "the Court must recognize a federal remedy at law wherever there has been an alleged constitutional deprivation, no matter that the victim of the alleged deprivation might have alternative remedies elsewhere, and that the proposed remedy would not significantly deter the principal wrongdoer, an individual private employee." *Id.* at 66. To the contrary, "[s]o long as the plaintiff had an avenue for

some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." *Id.* at 69 (emphasis added).

Despite this Court's clearly-stated reluctance to extend *Bivens* beyond the three specific circumstances authorized by the Court, both the district court and the Ninth Circuit found there to be a *Bivens* remedy available to respondents here. They accomplished this by essentially ignoring the previous twenty-eight years of this Court's *Bivens* jurisprudence and relying entirely on this Court's opinion in *Carlson*. There was a superficial logic to this in that *Carlson*, like the present claim, involved a *Bivens* action arising from a claim of deliberate indifference to a detained individual's medical needs. But both courts chose to interpret and apply the holding in *Carlson* without any effort to analyze that holding in the light of the numerous subsequent decisions of this Court on the availability of *Bivens* remedies. That failure led both courts to misinterpret *Carlson*, thereby leading them to their erroneous conclusion that a *Bivens* action could proceed against petitioners.

Both courts relied on the following language from *Carlson*:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a

> particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

Id. at 19 (citations omitted). Both the district court and the Ninth Circuit took this language to mean that there is a presumptive right to pursue a *Bivens* action unless one of the two described situations exists. *Castaneda,* 538 F. Supp. 2d at 1286 and *Castaneda,* 546 F.3d at 687. But, as discussed above, subsequent decisions of this Court have made clear that this interpretation of the language in *Carlson* is erroneous.

As this Court stated just two years ago in *Wilkie,* there is no "automatic entitlement" to a "freestanding damages remedy for a claimed constitutional violation . . . no matter what other means there may be to vindicate a protected interest. . . ." 551 U.S. at 550. Thus, the situations described in *Carlson* did not represent the sole circumstances in which a *Bivens* would be rejected, but merely two of those circumstances.

This Court in *Wilkie* explained what the actual rule is:

> [O]ur consideration of a *Bivens* request follows a familiar sequence, and on the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Id. at 550 (citations omitted). It is thus with this rule in mind that the question presented must be answered.

2. THE TEXT OF SECTION 233(a), AS WELL AS THE ACTIONS OF CONGRESS SUBSEUENT TO ITS ENACTMENT, MAKE CLEAR THAT SECTION 233(a) PRECLUDES A *BIVENS* REMEDY FOR CLAIMS ARISING FROM MEDICAL CARE AND RELATED FUNCTIONS PROVIDED BY PHS PERONNEL

As this Court explained in *Wilkie,* the first step in considering whether a new *Bivens* remedy should be recognized is to ask "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." 551 U.S. at 550. Respondents will undoubtedly argue that this analysis need not be conducted here because this Court, in *Carlson,* has already recognized the existence of *Bivens* actions where there is an allegation of deliberate indifference to medical needs. Indeed, the Ninth Circuit, in its opinion below, referring to *Carlson*, explicitly stated that its "decision does not extend *Bivens* into a new context." *Castaneda,* 546 F.3d at 701, n.24. But the present case unquestionably does extend *Bivens* into both a new context and to a new category of defendants. *See Iqbal,* 129 S. Ct. at 1948 (citing *Malesko,* 534 U.S. at 66).

As the district court explained in *Lewis v. Sauvey,* 708 F. Supp. 167, 169 (E.D. Mich. 1989), "[a]lthough the Supreme Court concluded that the plaintiffs in *Carlson* were not limited to an FTCA

remedy, but could pursue a *Bivens* action, the *Carlson* plaintiffs were suing federal prison officials, not medical personnel of the Public Health Service." Further, the present claim of deliberate indifference arises in the context of a detention facility operated by ICE to hold persons against whom removal proceedings are pending, not a federal prison housing convicted felons, a distinctly different context than was presented in *Carlson*. Thus, the analysis described in *Wilkie* does need to be conducted here to determine whether a *Bivens* action can properly be prosecuted against these petitioners.

A. Virtually Every Court That Has Interpreted Section 233(a) Has Held That Its Plain Language Precludes *Bivens* Actions Against PHS Personnel, And Congress Has Approved Of This Judicial Interpretation Of The Statute

In situations arising from the provision of medical care and related functions by PHS personnel, Congress has provided a specific and exclusive remedy for claims of personal injury and death:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or

> related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. § 233(a).[2]

"Statutory construction always starts with the language of the statute itself. This starting point is the ending point when the statute clearly and unambiguously expresses Congress' intent." *United States v. Derr*, 968 F.2d 943, 945 (9th Cir. 1992) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). The language of this statute is plain and unambiguous. The ***only*** remedy authorized by Congress for damages for personal injury "resulting from the performance of medical, surgical, dental, or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment" is a

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[2] The statute was originally added to the Public Health Service Act in 1970 as a second section 223. Public Law 91-623, Section 4. The statute was codified as 42 U.S.C. § 233. The next year clean-up legislation redesignated the statute as section 224 of the Public Health Service Act. Public Law 92-157, Title III, Section 301(c). To avoid confusion, the statute will be referred to as section 233 in this brief.

claim against the United States under the FTCA. No other civil action is permitted against the officer or employee.

To permit a *Bivens* action to be pursued in the circumstances described in the statute requires that this plain language be ignored and that the statute instead be interpreted to actually mean the following:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim, ***except for claims alleging violations of the United States Constitution***.

To so interpret the statute flies in the face of this Court's admonition that "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean v. United States,* 129 S. Ct. 1849, 1853 (2009) (quoting *Bates v. United States,* 522 U.S. 23, 29 (1997)). Virtually every federal court that has

been asked to find such an implied exception within the statute has refused to do so, relying on the plain language to conclude that the statute bars *Bivens* actions against PHS personnel for damages arising from their provision of medical and related services. Of the fifty-five decisions, published and unpublished, found by petitioner's counsel which addressed the issue of whether section 233 permitted the prosecution of *Bivens* actions against PHS personnel, forty-nine concluded that such actions were barred by the statute.[3]

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[3] **Courts of Appeal** (listed by Circuit in reverse chronological order):

Wallace v. Dawson, 302 Fed. Appx. 52, 54 (2d Cir. 2008); *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000); *Anderson v. Bureau of Prisons*, 176 Fed. Appx. 242, 243 (3d Cir. 2006); *Montoya-Ortiz v. Brown*, 154 Fed. Appx. 437, 439 (5th Cir. 2005); *Walls v. Holland*, 1999 U.S. App. LEXIS 26588 (6th Cir. Oct. 18, 1999); *Beverly v. Gluch*, 902 F.2d 1568 (6th Cir. Mich. 1990); *Miles v. Daniels*, 231 Fed. Appx. 591, 592 (9th Cir. 2007); *Zanzucchi v. Wynberg*, 933 F.2d 1018, 1991 U.S. App. LEXIS 10952 (9th Cir. May 21, 1991).

District Courts (listed in reverse chronological order):

Starling v. Kastner, 2009 U.S. Dist. LEXIS 89095 (E.D. Tex. Aug. 21, 2009); *K.R. v. Silverman*, 2009 U.S. Dist. LEXIS 83143 (E.D.N.Y. Aug. 13, 2009); *Golightly v. Kastner*, 2009 U.S. Dist. LEXIS 83390 (E.D. Tex. Aug. 5, 2009); *Luna v. Pearson*, 2009 U.S. Dist. LEXIS 49309 (S.D. Miss. June 11, 2009); *Geralds v. Patel*, 2009 U.S. Dist. LEXIS 14721 (E.D.N.Y. Feb. 20, 2009); *Anson v. Bailey*, 2009 U.S. Dist. LEXIS 12168 (W.D.N.Y. Feb. 18, 2009); *Uribe v. Outlaw*, 2009 U.S. Dist. LEXIS 9176 (E.D. Ark. Feb. 9, 2009); *Morales v. White*, 2008 U.S. Dist. LEXIS 80659 (W.D. Tenn. Oct. 10, 2008); *Stine v. Fetterhoff*, 2008 U.S. Dist. LEXIS 70863 (D. Colo. Sept. 19, 2008); *Hairston v.*

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Gonzales, 2008 U.S. Dist. LEXIS 52962 (E.D.N.C. July 11, 2008); *Batey v. Swanson*, 2008 U.S. Dist. LEXIS 12550 (N.D. W. Va. Feb. 19, 2008); *Lyons v. United States*, 2008 U.S. Dist. LEXIS 2260 (N.D. Ohio Jan. 11, 2008); *Lee v. Guavara*, 2007 U.S. Dist. LEXIS 71206 (D.S.C. Sept. 24, 2007); *Fourstar v. Vidrine*, 2007 U.S. Dist. LEXIS 70701 (S.D. Ind. Sept. 21, 2007); *Hodge v. United States*, 2007 U.S. Dist. LEXIS 64644 (M.D. Pa. Aug. 31, 2007); *Coley v. Sulayman*, 2007 U.S. Dist. LEXIS 57639 (D.N.J. Aug. 7, 2007); *Barner v. Williamson*, 2007 U.S. Dist. LEXIS 42942 (M.D. Pa. Mar. 27, 2007); *Wallace v. Dawson*, 2007 U.S. Dist. LEXIS 6279 (N.D.N.Y Jan. 29, 2007); *Salley v. Ellis*, 2006 U.S. Dist. LEXIS 90898 (M.D. Ga. Dec. 14, 2006); *Baez v. Arbuckle*, 2006 U.S. Dist. LEXIS 84013 (M.D. Ga. Nov. 16, 2006); *Davis v. Stine*, 2006 U.S. Dist. LEXIS 79689 (E.D. Ky. Oct. 31, 2006); *Barbaro v. United States ex rel. Fed. Bureau of Prisons FCI Otisville*, 2006 U.S. Dist. LEXIS 79338 (S.D.N.Y. Oct. 27, 2006); *Butler v. Shearin*, 2006 U.S. Dist. LEXIS 97961 (D. Md. Aug. 29, 2006) (aff'd 279 Fed. Appx. 274, 275 (4th Cir. 2008)); *Cuco v. Fed. Med. Center-Lexington*, 2006 U.S. Dist. LEXIS 49711 (E.D. Ky. June 9, 2006); *Arrington v. Inch*, 2006 U.S. Dist. LEXIS 20193 (M.D. Pa. Mar. 30, 2006); *Smith v. Anderson*, 2006 U.S. Dist. LEXIS 23130 (S.D. W. Va. Mar. 27 2006); *Pimentel v. Deboo*, 411 F. Supp. 2d 118, 127 (D. Conn. 2006); *Ekwere v. Branch*, 2005 U.S. Dist. LEXIS 30483 (D. Ariz. Nov. 28, 2005); *Anderson v. Bureau of Prisons*, 2005 U.S. Dist. LEXIS 41911 (M.D. Pa. Sept. 22, 2005); *Williams v. Stepp*, 2006 U.S. Dist. LEXIS 73239 (S.D. Ill. Sept. 21, 2006); *Whooten v. Bussanich*, 2005 U.S. Dist. LEXIS 37995 (M.D. Pa. Sept. 2, 2005); *Freeman v. Inch*, 2005 U.S. Dist. LEXIS 41915 (M.D. Pa. May 16, 2005); *Dawson v. Williams*, 2005 U.S. Dist. LEXIS 3059 (S.D.N.Y. Feb. 28, 2005); *Lovell v. Cayuga Corr. Facility*, 2004 U.S. Dist. LEXIS 20584 (W.D.N.Y. Sept. 29, 2004); *Tillitz v. Jones*, 2004 U.S. Dist. LEXIS 19401 (D. Or. Sept. 22, 2004); *Miles v. Daniels*, 2004 U.S. Dist. LEXIS 19400 (D. Or. Sept. 21, 2004); *Valdivia v. Hannefed*, 2004 U.S. Dist. LEXIS 16355 (W.D.N.Y. Aug. 10, 2004); *Foreman v. Fed. Corr. Inst.*, 2006 U.S. Dist. LEXIS 96187 (S.D. W. Va. Mar. 29, 2006); *Cook v. Blair*, 2003 U.S. Dist. LEXIS 27806 (E.D.N.C. Mar. 20, 2003) (aff'd 82 Fed. Appx. 790, 791 (4th Cir. 2003)); *Brown v. McElroy*, 160

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Of the remaining six decisions, two were the district court and Ninth Circuit opinions issued in this case: *Castaneda,* 538 F. Supp. 2d 1279 and *Castaneda,* 546 F.3d 682. The third relied entirely on the Ninth Circuit's decision in *Castaneda*: *Starling v. United States,* 2009 U.S. Dist. LEXIS 101275 (D.S.C. May 12, 2009). The fourth was the district court opinion that was reversed by the Second Circuit in *Cuoco,* 222 F.3d 99: *Cuoco v. Quinlan,* 1992 U.S. Dist. LEXIS 17476 (S.D.N.Y. Nov. 12, 1992). The fifth was another New York district court opinion which was effectively overruled by *Cuoco*: *McMullen v. Hersch-berger,* 1993 U.S. Dist. LEXIS 78 (S.D.N.Y. Jan. 7, 1993). The sixth decision was a Magistrate Judge's report and recommendation: *Black v. Kendig,* 2003 U.S. Dist. LEXIS 4109 (D.D.C. Mar. 18, 2003) (adopted in part by the district court by order dated February 3, 2004).

This Court too has at least implicitly agreed with the conclusion reached by the vast majority of the lower courts that have addressed this issue. In *Carlson*, the issue before this Court was whether the mere fact that a remedy is available under the FTCA was sufficient to bar a parallel *Bivens* remedy. 446 U.S. at 16. The Court rejected such a bar because, in part, "we have here no explicit congressional declaration that persons injured by federal officers'

F. Supp. 2d 699, 703 (S.D.N.Y. 2001); *Navarrete v. Vanyur,* 110 F. Supp. 2d 605 (N.D. Ohio 2000); *Lewis v. Sauvey,* 708 F. Supp. 167, 168 (E.D. Mich. 1989).

violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress." *Id.* at 19. The Court then explained that its conclusion that the existence of a remedy under the FTCA did not automatically bar a parallel *Bivens* action "is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See . . . 42 U.S.C. § 233(a). . . ." *Id.* at 20. Thus, this Court has already recognized that the unambiguous language of section 233(a) makes the FTCA the exclusive remedy for claims arising under that statute, barring even parallel *Bivens* actions.

Congress appears to agree that the overwhelming majority of the courts have correctly interpreted section 233(a). Congress has amended section 233 eleven times since it was enacted in 1970.[4] If Congress had believed that the federal courts were misinterpreting the scope of section 233(a), it could have taken the opportunity presented by any one of

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[4] Nov. 18, 1971, P.L. 92-157, Title III, § 301(c), 85 Stat. 463; Oct. 24, 1992, P.L. 102-501, §§ 2-4, 106 Stat. 3268; June 10, 1993, P.L. 103-43, Title XX, § 2010(a)(4), 107 Stat. 213; Dec. 14, 1993, P.L. 103-183, Title VII, § 706(a), 107 Stat. 2241; Dec. 26, 1995, P.L. 104-73, §§ 2-4, 5(a), (b), 6-11, 109 Stat. 777, 780; Aug. 21, 1996, P.L. 104-191, Title I, Subtitle C, § 195, 110 Stat. 1988; Oct. 11, 1996, P.L. 104-299, § 4(a), 110 Stat. 3644; Oct. 26, 2002, P.L. 107-251, Title VI, § 601(a), 116 Stat. 1664; Nov. 25, 2002, P.L. 107-296, Title III, § 304(c), 116 Stat. 2165; April 30, 2003, P.L. 108-20, § 3(a)-(l), 117 Stat. 646; Dec. 6, 2003, P.L. 108-163, § 2(m)(1), 117 Stat. 2023.

those eleven occasions to amend the statute to explicitly state that it was not intended to preclude the prosecution of *Bivens* actions against PHS personnel. But it never did, which this Court has previously recognized as being a significant act on the part of Congress.

> Congress in the face of these decisions has permitted the clause as it now appears in paragraph (6) to stand for many years without change in its phraseology, although amending that portion of the Bankruptcy Act in other particulars. This is persuasive evidence of the adoption by that body of the judicial construction.

Missouri v. Ross, 299 U.S. 72, 76 (1936); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

B. Congress's Actions In Regard To Other Statutes Indicate That It Interprets Section 233(a) As Precluding *Bivens* Actions Against PHS Personnel

In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988, generally known as the Westfall Act, which expanded the coverage of the FTCA. Among other things, the Westfall Act replaced the existing subsection (b) of section 2679 of Title 28 of the United States Code with the following:

> (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –
>
> (A) which is brought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

Section 2679(b) was intended to expand the immunity from suit available to federal employees. But Congress indicated that it did not intend this legislation to change existing law, "as interpreted by the courts, with respect to the availability of other

recognized causes of action, nor does it either expand or diminish rights established under other Federal statutes." H. Rep. No. 100-700, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5951.

The language of section 2679(b)(1) is similar to that found in section 233(a). In particular, section 2679(b)(1) states that the remedy provided under the FTCA against the United States is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee." The language of section 233(a) is almost identical, stating that the remedy against the United States provided by the FTCA "shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim." But unlike section 233(a), Congress added an additional provision to section 2679(b), stating in subsection (b)(2) that, "Paragraph (1) does not extend or apply to a civil action against an employee of the Government – (A) which is brought for a violation of the Constitution of the United States," i.e., *Bivens* actions.

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (citation and quotation omitted). Clearly then, Congress felt it was necessary to include subsection

(b)(2) to prevent subsection (b)(1) from being understood to preclude *Bivens* actions against federal employees.

This Court has similarly concluded that this was Congress's intention. In *United States v. Smith*, 499 U.S. 160, 165-66 (1991), the Court noted that section 2679(b)(1) "states that 'the remedy' against the Government under the FTCA 'is exclusive of any other civil action or proceeding for money damages . . . against the employee' and then reemphasizes that 'any other civil action or proceeding for money damages . . . against the employee . . . is precluded.'" The Court then described section 2679(b)(2) as preserving some tort liability of Government employees when suit would otherwise be barred by creating two "exceptions" to that immunity, including in the case of *Bivens* actions.

All of this clarifies the scope of the protection provided by section 233(a):

> [I]t is a well established principle that courts may look to subsequent legislation as an aid in the interpretation of prior legislation dealing with the same or similar subject matter. Indeed, Chief Justice Marshall stated the principle that, if it can be gathered from a subsequent statute [i]n pari materia what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning,

> and will govern the construction of the first statute.

Jordan v. United States DOJ, 591 F.2d 753, 770 (D.C. Cir. 1978) (en banc) (citing *Alexander v. Alexandria,* 9 U.S. (5 Cranch) 1, 7-8, 3 L. Ed. 19 (1809)); *see also United States v. Rodriguez,* 60 F.3d 193, 196 (5th Cir. 1995) (citing *United States v. Freeman,* 44 U.S. (3 How.) 556, 564, 11 L. Ed. 724 (1845)).

Since Congress, by adding subsection (b)(2) to section 2679, clearly interpreted the language of subsection (b)(1) as otherwise preventing the prosecution of *Bivens* actions, it must be presumed that Congress similarly interpreted the almost identical language of section 233(a). In other words, Congress's action in adding subsection (b)(2) to section 2679 effectively "amounted to a legislative declaration of [the] meaning" of section 233(a); to wit, that its scope precluded the prosecution of *Bivens* actions against PHS personnel.

This can further be seen in the enactment in 2000 of the Public Health Improvement Act, 106 P.L. 505; 114 Stat. 2314. Title IV of the Act addressed the placement of automated external defibrillator devices in Federal buildings. Section 404 of the Act added section 248 to the Public Health Service Act, codified as 42 U.S.C. § 238q, which limited the liability of persons utilizing the defibrillator devices. Subsection (c)(1)(C) of section 238q provides that:

> This section does not waive any protection from liability for Federal officers or employees under –
>
> (i) section 233 of this title; or
>
> (ii) sections 1346(b), 2672, and 2679 of title 28, United States Code, or under alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28.

Thus, Congress explicitly distinguished the liability protection offered by section 233 from that offered by section 2679. As discussed above, statutory analysis indicates that the distinction between the protection offered by the two statutes is that section 2679, by its explicit terms, does not offer any protection from liability through *Bivens* actions (per section 2679(b)(2)), while section 233 does offer such protection.

Significantly, Public Law 106-505 was enacted on November 13, 2000. This was three-and-a-half months after the Second Circuit had issued its opinion in *Cuoco,* holding that section 233(a) barred *Bivens* actions against PHS personnel. At the time Congress enacted Public Law 106-505, *Cuoco* was the only published court of appeals decision addressing the question of whether section 233(a) barred *Bivens* actions against PHS personnel.

> [W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 581 (1978).

Thus, when Congress made reference to section 233 in the newly-enacted section 238q, it presumably was aware of the Second Circuit's interpretation of the scope of the protection provided by section 233(a) to PHS personnel. Therefore, when Congress referred in section 238q(c)(1)(C) to the "protection from liability for Federal officers or employees under . . . section 233," it was presumably including in the scope of that protection immunity from *Bivens* actions, as stated by the Second Circuit in *Cuoco*. If that had not been Congress's intent, it certainly would have said so.

Congress has thus clearly – and repeatedly – indicated its satisfaction with an interpretation of section 233(a) that precludes the prosecution of *Bivens* actions against PHS personnel.

3. IT IS IRRELEVANT WHETHER THE FTCA PROVIDES WHAT A COURT MIGHT CONCLUDE IS AS EFFECTIVE A REMEDY AS A *BIVENS* ACTION

A key element of the Ninth Circuit's decision below was its conclusion that the FTCA is not as effective a remedy as a *Bivens* action, and that therefore section 233(a) could not bar a plaintiff from pursuing a *Bivens* action, notwithstanding the "exclusive remedy" language in that statute. *Castaneda,* 546 F.3d at 689-91. This conclusion derived from the Ninth Circuit's interpretation of *Carlson* as having "established a two-part test for express *Bivens* preemption: Congress must provide an alternative remedy that is 'explicitly declared to be a substitute for' *Bivens* (rather than a complement to it) and Congress must view that remedy as 'equally effective.' 446 U.S. at 18-19." *Id.* at 689. But the Ninth Circuit was misinterpreting this language from *Carlson.*

Carlson did not establish a two-part test for express *Bivens* preemption. Rather, the actual language in *Carlson* states that a *Bivens* action will be precluded when "Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 19. The only relevant portion of this statement is the requirement that Congress has provided an alternative remedy. As this Court has repeatedly held (see discussion in Section 1 above), it is the prerogative of Congress to determine what remedies are appropriate

for a particular violation, and deference to that Congressional prerogative precludes courts from substituting their views as to whether those substitute remedies are "equally effective" as other potential remedies.

Not only is the very question of whether the FTCA is as "equally effective" as a *Bivens* action irrelevant, the Ninth Circuit's analysis of that question ignored the relevant holdings of this Court's various *Bivens* opinions issued since *Carlson* was decided. The Ninth Circuit concluded that the FTCA was not as equally effective a remedy as a *Bivens* action because of the procedural requirements and limitations on damages associated with FTCA actions: that damages are not available against individual defendants, that punitive damages are not permitted, that there is no right to a jury trial, and that the United States's liability under the FTCA is limited "in accordance with the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b)(1)), rather than being national in scope. *Castaneda,* 546 F.3d at 689-690. But, as discussed above, this Court has held in cases decided after *Carlson* that it is not necessary that an alternative remedy provide the same processes and damages as a *Bivens* action for the existence of that remedy to be sufficient to bar a *Bivens* action.

For example, in *Bush*, the Court refused to create a *Bivens* remedy for an employee of the National Aeronautics and Space Administration who was fired after making critical public remarks about his

employer, explaining that Congress was in a better position to balance the competing policy concerns of "governmental efficiency and the rights of employees" even if the "existing remedies do not provide complete relief for the plaintiff." 462 U.S. at 388-89. "[W]e decline to create a new substantive legal liability without legislative aid and as at the common law because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390 (citation and quotation marks omitted).

In *Schweiker*, this Court held that a non-comprehensive statutory remedy could preclude a *Bivens* claim. In that case, social security disability recipients sued individual federal employees under *Bivens* for alleged violations of their due process rights when their benefits were wrongfully terminated. 487 U.S. at 414. Although the plaintiffs' remedy under the remedial program consisted only of an award of back benefits, this Court held that this was a sufficient remedy to preclude a *Bivens* action. *Id.* at 428-429; *see also Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.") (emphasis added).

Thus, the very factors that were so essential to the Ninth Circuit's analysis of why section 233(a) does not bar *Bivens* actions against PHS personnel have been found by this Court not to be relevant to

such an analysis. The foundation of the Ninth Circuit's opinion turns out to be non-existent.

4. THE NINTH CIRCUIT'S RELIANCE ON THE LEGISLATIVE HISTORY AND THE STATUTE'S TITLE IN CONCLUDING THAT SECTION 233(a) DOES NOT PRECLUDE A *BIVENS* ACTION AGAINST PHS PERSONNEL WAS MISPLACED

To get around the plain language of the statute, the Ninth Circuit relied on the legislative history related to the enactment of section 233(a) and the title given to the statute in the enacting legislation. But that reliance was misplaced.

"[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'" *Barnhill v. Johnson*, 503 U.S. 393, 402 (1992) (citation omitted). "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). Similarly, "'[t]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] sheds light on some ambiguous word or phrase.'" *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted).

As discussed in Section 2 above, there is nothing ambiguous about section 233(a). The meaning of the statute is plain on its face: the ***only*** remedy available for a claim of personal injury or death "resulting from the performance of medical, surgical, dental, or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment" is a claim against the United States under the FTCA. Given that, there is no need to review the legislative history or to consider the title of the act in interpreting the statute. But even if the legislative history and the statute's title are considered, they do not change the conclusion that the plain language of section 233(a) bars *Bivens* actions against PHS personnel.

In describing the legislative history of the statute, the Ninth Circuit asserted that "the legislative history of § 233(a) . . . reveals that Congress's exclusive concern was with common law malpractice liability," noting that "[t]he only two statements on the floor of either house of Congress respecting the bill mentioned only medical malpractice, with nothing being said about constitutional violations." *Castaneda,* 546 F.3d at 693. The Ninth Circuit further explained "that the Surgeon General had requested the amendment because PHS physicians 'just cannot afford to take out the customary liability insurance as most doctors do'" and that "[t]he section itself was titled in the Statutes at Large 'Defense of Certain Malpractice and Negligence Suits.'" *Id.* The

Ninth Circuit concluded that "[t]hus, not only is the authoritative text of the statute silent as to constitutional torts in particular, but the title and legislative history, if anything, indicate an exclusive concern with state malpractice claims." *Id.* at 694.

The Ninth Circuit misinterpreted the significance of the title in the Statutes at Large. The appellate court focused on the word "malpractice," which it apparently understood simply to mean medical negligence. *Id.* at 694, n.12. But the statute's title refers not just to "malpractice" but also to "negligence suits." There would have been no need to separately refer to a specific sub-class of negligence suits – medical negligence – if all that Congress intended to be encompassed by the phrase "Defense of Certain Malpractice and Negligence Suits" were negligence suits. But malpractice means more than just medical negligence, which thus makes understandable Congress's decision to make reference in the statute's title to both malpractice and negligence suits.

In 1970, when section 233(a) was enacted, there were published cases that expanded the definition of malpractice well beyond the narrow confines of medical negligence. For example, in *Sommer v. New Amsterdam Casualty Co.*, 171 F. Supp. 84 (D. Mo. 1959), the plaintiff, a psychiatrist, sued his malpractice insurance carrier for failing to defend him in a lawsuit which accused him of "making an assault upon [a patient] by placing him in a sanatorium for the mentally ill." *Id.* at 85. The carrier denied coverage "because [the patient] alleged an assault,

and because the word 'assault' connotes a crime, we did not owe the insured either the duty to defend or to pay." *Id.* at 86. The district court denied the insurer's motion for summary judgment because "[t]he word 'malpractice' includes the performance of criminal acts." *Id.* In *Bakewell v. Kahle,* 125 Mont. 89, 93 (1951), the Montana Supreme Court explained that "malpractice . . . means bad or unskillful practice, resulting in injury to the patient, and comprises all acts and omissions of a physician or surgeon as such to a patient as such, which may make the physician or surgeon either civilly or criminally liable." (citation and quotation marks omitted).

By entitling the statute "Defense of Certain Malpractice and Negligence Suits," Congress was making clear that it was not limiting the coverage of the statute to just claims of medical negligence, but to any claim that might be labeled "malpractice," i.e. to claims relating to "all acts and omissions of a physician or surgeon as such to a patient as such, which may make the physician or surgeon either civilly or criminally liable." *Bakewell,* 125 Mont. at 93. Congress used similarly expansive language in section 233(a):

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 . . . for damage for personal injury, including death, ***resulting from the performance of medical, surgical, dental, or***

> ***related functions ... by any commissioned officer or employee of the Public Health Service*** while acting within the scope of his office or employment, shall be exclusive of ***any other civil action or proceeding*** by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim. (emphasis added).

This interpretation of the title attached to section 233 in the Statutes at Large is consistent with the purpose of the statute as described in the legislative history. Specifically, as the Ninth Circuit itself stated, "Representative Staggers noted that the Surgeon General had requested the amendment because PHS physicians 'just cannot afford to take out the customary liability insurance as most doctors do.' 91 Cong. Rec. H42,543." *Castaneda,* 546 F.3d at 694. But if, as the district court in *Sommer* held, malpractice could include even criminal acts, and if such "malpractice" was potentially covered by "customary liability insurance," then the concern of the Surgeon General referenced by Rep. Staggers would necessarily not be limited simply to claims of medical negligence. It would encompass all lawsuits arising from the work of the officers and employees of the PHS for which they could not afford to obtain insurance due to their low salaries. As this Court noted in *Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 80 (1998), "statutory prohibitions often go beyond the principal evil to cover reasonably

comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

In summary, because the statute has a plain meaning, it is not necessary to analyze its legislative history or its title. But if such analysis were to be conducted, it would lead to the same result: section 233(a) precludes *Bivens* actions against PHS personnel.

5. THERE ARE SPECIAL FACTORS PRESENT THAT COUNSEL CAUTION BEFORE RECOGNIZING A *BIVENS* REMEDY AGAINST PHS PERSONNEL

As discussed above, this Court in *Wilkie,* explained that "the decision whether to recognize a *Bivens* remedy may require two steps." 551 U.S. at 550. The first, addressed at length above, is whether an alternative remedy exists.

> But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Id. (quoting *Bush*, 462 U.S. at 378). Petitioner contends that, through section 233(a), Congress has provided an alternative remedy – a FTCA claim

against the United States – and on that basis a *Bivens* action should not be recognized against PHS personnel related to their performance of medical, surgical, dental, or related functions. But even if this Court were to disagree on that point, it would then have to move to the second step of the analysis as described in *Wilkie*. And there are special factors present here which counsel hesitation before recognizing a *Bivens* action.

As the district court's discussion of the legislative history of section 233 indicates, the motivation for the enactment of subsection (a) was the low pay received by the officers and employees of the PHS.

> Representative Staggers, who introduced the amendment, . . . emphasized that the amendment was "needed because of the low salaries that [PHS doctors] receive and in view of their low salaries, they cannot afford to take out the insurance to cover them in the ordinary course of their practice of medicine."

Castaneda, 538 F. Supp. 2d at 1294 (citation omitted).

The Second Circuit, in its decision finding that *Bivens* actions were precluded by section 233(a), explained that by limiting the potential personal liability of PHS personnel, "[t]he statute may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order better to serve, among others, federal prisoners." *Cuoco*, 222 F.3d at 108.

In its *amicus curiae* brief submitted in support of the petitions for writ of certiorari filed herein, the Commissioned Officers Association of the United States Public Health Service, Inc. expressed concern that, if this Court affirms the interpretation of section 233(a) adopted by the Ninth Circuit below, "[t]he attendant need for malpractice insurance, at great cost, together with the ever-present threat of being subjected to litigation, will undoubtedly have negative consequences for the USPHS's recruitment and retention of qualified medical personnel." USPHS *Amicus* Brief at 7.

All of this counsels hesitation before authorizing the prosecution of *Bivens* actions against PHS personnel. An additional factor counseling hesitation is the likely flood of *Bivens* claims that would ensue if this Court authorizes them. *Bivens* allegations of deliberate indifference can easily be added to most lawsuits arising from the performance by PHS personnel of medical, surgical, dental, or related functions. This is not a theoretical concern.

In Section 2.A. above, petitioner identified fifty-five published and unpublished decisions which addressed the issue of whether section 233(a) permitted the prosecution of *Bivens* actions against PHS personnel. A review of the facts described in those opinions reveals that in at least fifteen of those cases, nothing more than standard claims of medical

negligence were alleged.[5] In twenty other cases, the allegation was a delay in treatment or a failure to treat, both of which claims often reflect nothing more than a disagreement between the patient and the doctor as to the nature and extent of the treatment that should be provided for a particular condition.[6]

Since inherent in any medical negligence claim is an assertion that the physician or other health care professional fell below the standard of care, there is no reason why almost every litigant pursuing a claim arising from medical care or treatment provided by PHS personnel could not make a claim of deliberate

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[5] *Wallace*, 302 Fed. Appx. at 54; *Anderson*, 176 Fed.Appx. at 243; *Beverly*, 902 F.2d 1568; *Uribe*, 2009 U.S. Dist. LEXIS 9176; *Morales*, 2008 U.S. Dist. LEXIS 80659; *Hairston*, 2008 U.S. Dist. LEXIS 52962; *Hodge*, 2007 U.S. Dist. LEXIS 64644; *Coley*, 2007 U.S. Dist. LEXIS 57639; *Wallace v. Dawson*, 2007 U.S. Dist. LEXIS 6279; *Barbaro*, 2006 U.S. Dist. LEXIS 79338; *Cuco*, 2006 U.S. Dist. LEXIS 49711; *Arrington*, 2006 U.S. Dist. LEXIS 20193; *Smith*, 2006 U.S. Dist. LEXIS 23130; *Whooten*, 2005 U.S. Dist. LEXIS 37995; and *Valdivia*, 2004 U.S. Dist. LEXIS 16355.

[6] *Miles*, 231 Fed. Appx. at 592; *Zanzucchi*, 933 F.2d 1018; *Luna*, 2009 U.S. Dist. LEXIS 49309; *Geralds*, 2009 U.S. Dist. LEXIS 14721; *Anson*, 2009 U.S. Dist. LEXIS 12168; *Stine*, 2008 U.S. Dist. LEXIS 70863; *Batey*, 2008 U.S. Dist. LEXIS 12550; *Fourstar*, 2007 U.S. Dist. LEXIS 70701; *Salley*, 2006 U.S. Dist. LEXIS 90898; *Baez*, 2006 U.S. Dist. LEXIS 84013; *Davis*, 2006 U.S. Dist. LEXIS 79689; *Butler*, 2006 U.S. Dist. LEXIS 97961; *Pimentel*, 411 F. Supp. 2d at 127; *Ekwere*, 2005 U.S. Dist. LEXIS 30483; *Anderson*, 2005 U.S. Dist. LEXIS 41911; *Freeman*, 2005 U.S. Dist. LEXIS 41915; *Lovell*, 2004 U.S. Dist. LEXIS 20584; *Tillitz*, 2004 U.S. Dist. LEXIS 19401; *Cook*, 2003 U.S. Dist. LEXIS 27806; *Lewis*, 708 F. Supp. at 168.

indifference, thereby opening the flood gates of litigation.

So claims of deliberate indifference can be easily made, but they are not so easily disposed of. Few will be amenable to dismissal at the pleading stage, and many may not be susceptible to resolution even by way of summary judgment, especially when they turn on expert testimony. The question of whether a physician's actions in caring for a patient fell below the applicable standard of care is one that must be answered by experts, and the presence of conflicting expert declarations at summary judgment will usually result in the denial of such a motion. This may be sufficient to defeat a defense of qualified immunity as well because disputed issues of material fact will defeat a motion for summary judgment based on qualified immunity. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995).

If this Court affirms the Ninth Circuit and holds that section 233(a) permits *Bivens* claims against individual officers and employees of the PHS, any meaningful benefit to PHS personnel from the exclusive remedy provision of section 233(a) will be eliminated. The ability of plaintiffs to easily re-state their medical negligence causes of action as *Bivens* claims alleging deliberate indifference will mean that, in the vast majority of the lawsuits arising from the provision of medical, surgical, dental, or related functions by personnel of the PHS, it will be all but impossible for the United States to invoke section 233 to fully substitute itself in place of the named PHS officers and employees, thereby forcing those

individuals to remain as active defendants in the action.

Earlier this year this Court found a similar concern to be of importance when it addressed the question of whether supervising prosecutors were entitled to the same absolute immunity as line prosecutors. The Court concluded that the supervisors were entitled to such immunity, commenting that, "[m]ost important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler*." *Van de Kamp v. Goldstein,* 129 S. Ct. 855, 864 (2009). A similar situation would likely arise here, resulting in the evisceration of section 233(a).

Given all this, petitioner contends that the second step of the required *Wilkie* analysis also indicates that a *Bivens* action should not be permitted as to PHS personnel.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit and order that court to reverse the decision of the district court denying the petitioners' motion to dismiss and to order that court to grant petitioners' motion.

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RESPONDENT'S BRIEF

No. 08-1529

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In The
Supreme Court of the United States

ESTHER HUI, ET AL.,

Petitioners,

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does 42 U.S.C. § 233, which incorporates the Federal Torts Claims Act ("FTCA") and its exclusivity provision, 28 U.S.C. § 2679(b), bar a civil action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Public Health Service officials for violating the United States Constitution and causing the penile amputation and death of Francisco Castaneda, when the FTCA's exclusivity provision, by its terms, "does not extend or apply to a civil action against an employee of the Government . . . for a violation of the Constitution of the United States"?

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STATUTORY PROVISIONS

This case involves the immunity provisions in 42 U.S.C. § 233 of the Public Health Service Act ("PHS Act") and 28 U.S.C. § 2679(b) of the Federal Tort Claims Act ("FTCA"). These and other relevant statutes are reproduced in an appendix to this brief.

STATEMENT OF THE CASE

The issue in this case is whether two Public Health Service ("PHS") officials can be sued for violating the Constitution and causing the penile amputation and death of Francisco Castaneda through conduct that, in the district court's words, "transcends negligence by miles" and appears to be "one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered." Migliaccio App. to Pet. Cert. 74a, 80a n.16 ("Pet. App."). Petitioners contend that, even if they blatantly violated Castaneda's constitutional rights, they cannot be held personally accountable. They claim that Castaneda's surviving family members and estate are limited to a negligence lawsuit against the United States under the FTCA because 42 U.S.C. § 233(a) immunizes them from lawsuits for constitutional violations—*i.e.*, *Bivens* actions. However, the FTCA's exclusivity provision—which § 233(a) incorporates and which applies to all federal employees—expressly states that it "does not extend or apply to a civil action against an employee of the

Government . . . for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(1)-(2). This case will determine whether those words mean what they say.

A. Factual Background

Francisco Castaneda was an immigration detainee who had his penis amputated, and ultimately died of penile cancer at 36, because Petitioners refused to provide him with a simple skin biopsy they knew was necessary. J.A. 334-35, 338. Petitioners ignored increasingly-insistent recommendations from their own staff and outside physicians—and created false and misleading records about Castaneda's condition and treatment—while Castaneda had a growing, fungating penile lesion bleeding through his underwear. J.A. 110, 124-25, 136-37, 167-68, 172, 184, 345, 347-48, 355-56. Their "treatment" of Castaneda during his nearly eleven-month detention by Immigration and Customs Enforcement ("ICE") consisted primarily of ibuprofen, antihistamines, antibiotics, and an extra allotment of boxer shorts. J.A. 354-55, 358.

Castaneda entered the San Diego Correctional Facility ("SDCF") under ICE custody on March 27, 2006, after serving a four-month sentence with the California Department of Corrections. J.A. 343, 345. That day, he informed SDCF staff of a lesion on his penis that was painful, bleeding, and exuding discharge. J.A. 345. The next day, physician assistant

Lieutenant Anthony Walker examined Castaneda, noted a large "mushroomed" genital lesion and a family history of cancer, and recommended a urology consult and biopsy "ASAP." J.A. 109-12, 292, 345-46. Walker reported to and worked under the "close supervision" of Petitioner Hui. Ninth Circuit Supplemental Excerpts of Record ("SER") 358.[1]

Hui, a PHS civilian employee, was the treating physician responsible for Castaneda's medical care during his eight-month detention at SDCF. J.A. 239; SER 358, 366. Petitioner Gonsalves, a PHS officer, was SDCF's Health Services Administrator. J.A. 239. Both worked for the Division of Immigration Health Services ("DIHS"). SER 351.

When Hui first examined Castaneda, she believed that he had either cancer or an infection and knew that the standard of care required her to rule out penile cancer with a biopsy—the only definitive diagnostic test for doing so. SER 360-61, 363. Despite this knowledge, Hui never arranged for the test to be administered and declined an outside physician's offer to arrange for the biopsy. J.A. 125; SER 372, 379.

Walker's request for a urology consult and biopsy for Castaneda "ASAP" was not approved by DIHS for

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[1] Petitioners' and the government's briefs omit the fact that Walker recommended a urology consult and biopsy "ASAP." *See* Gonsalves Br. 4; Hui Br. 4; U.S. Br. 3.

two months. J.A. 113-15, 292-94, 346; SER 368-69.[2] Even then, Castaneda never received a biopsy while in ICE custody. J.A. 363.

A week after DIHS approved the biopsy, Castaneda was sent to oncologist John Wilkinson, M.D. Wilkinson examined Castaneda and ordered urgent diagnosis and treatment, including a biopsy. J.A. 115-25, 294, 346-47. Wilkinson documented that Castaneda might have "penile cancer or a progressive viral based lesion" and noted:

> I strongly agree that it requires urgent urologic assessment of biopsy and definitive treatment. In this extremely delicate area and [sic] there can be considerable morbidity from even benign lesions which are not promptly and appropriately treated.
>
> * * *
>
> I spoke with the physicians at the correctional facility. I have offered to admit patient for a urologic consultation and biopsy. Physicians there wish to pursue outpatient biopsy which would be more cost

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[2] DIHS approved a Treatment Authorization Request ("TAR") submitted by Walker. J.A. 111-15. DIHS "on-site" medical providers complete TARs when they believe off-site care is required, then send them to a "managed care coordinator" who decides, with a DIHS physician, whether to authorize treatment. J.A. 90-96. Detainees' TAR histories are available online to on-site providers, SER 366, so treating physicians like Hui can know their status at all times.

> effective. They understand the need for urgent diagnosis and treatment.

J.A. 116, 124. Wilkinson told Hui "in no uncertain terms" that Castaneda's penile lesion required a biopsy and offered to admit Castaneda for the test. J.A. 125; SER 373.[3] Nonetheless, Hui insisted that a biopsy was an "elective" out-patient procedure and she did not admit him to a hospital. J.A. 125.[4] According to Hui, any medical condition where death is not immediately imminent is "elective." SER 369-70.[5]

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[3] Petitioner Gonsalves claims Wilkinson "made clear" that Castaneda should see a urologist first and only return to him if a biopsy showed cancer, and that "DIHS therefore sent Castaneda to Scripps Mercy where he could be examined by a urologist immediately." Gonsalves Br. 7 n.3. This ignores that Wilkinson offered to admit Castaneda for the consult and biopsy that same day and that Hui declined the offer because it was not "cost effective." J.A. 124. Moreover, five weeks elapsed before SDCF sent Castaneda to Scripps Mercy. J.A. 140-47, 351.

[4] When Hui declined Wilkinson's offer, she knew that DIHS was having difficulty locating a urologist to perform out-patient procedures on SDCF detainees due to "payment issues." SER 367-68, 374. Thus, she knew it would be difficult to get Castaneda an "out-patient" biopsy in the foreseeable future.

[5] Petitioners suggest that DIHS policy required Hui to arrange the biopsy on an out-patient basis. Gonsalves Br. 5; Hui Br. 5. This assertion is unsupported by the record. DIHS had already approved a biopsy without regard to whether it was performed in- or out-patient. J.A. 113-15, 292-94, 346. Moreover, Hui admitted that there was "no reason for [her] to refuse this procedure to go forward" and that, under DIHS policy, cancer should be treated "without any questions asked." SER 361, 368-69.

On June 30, while Hui knew that only a biopsy could determine whether Castaneda had cancer, DIHS medical records reported that Castaneda "DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory"—and that Castaneda "needs to be patient and wait." J.A. 133-34 (emphasis in original). They said his lesion had been "looking and acting a bit more angry" the past few months and there was "a severe deformed uncircumcised foreskin growth that could use attention." *Id.*

On July 13, both Wilkinson and an outside urologist, Dr. Masters, "strongly recommend[ed] admission, urology consultation, surgical intervention via biopsy/exploration under anesthesia to include circumcision if non-malignant findings." J.A. 139. SDCF staff sought approval for Emergency Room ("ER") evaluation and treatment, documenting that Castaneda's penile lesion "now appears to be 'exploding' for lack of better words." J.A. 134-37, 139-40.

SDCF staff then took Castaneda to the Scripps ER. J.A. 140-47, 351. Dr. Juan Tovar examined Castaneda and recommended hospital admission to "rule out cancer, versus infectious etiology." J.A. 140-44. Daniel Hunting, M.D., a Scripps urologist, briefly examined Castaneda, did not obtain Castaneda's prior family history of cancer, and stated that his lesion was probably "condyloma" (*i.e.*, genital warts). J.A. 144-45, 351. Rather than treat Castaneda, Hunting referred him back to his "primary treating

urologist," despite his observation that his condition was so severe that his penis required "resection"—*i.e.*, partial surgical removal. J.A. 145, 148. Hui, meanwhile, still did not take any steps to ensure that Castaneda would get a biopsy. When Castaneda suffered from insomnia due to his condition, he was given an antihistamine and told to practice "stress reduction techniques." J.A. 164.

For five weeks after the ER visit, Castaneda still went untreated. At that point, Masters concluded that Castaneda needed a circumcision, to relieve the "ongoing medical side effects of the lesion including infection and bleeding" and provide a biopsy to "rule out malignant neoplasm" (*i.e.*, cancer). J.A. 156-60. Masters also offered to arrange for Castaneda's admission at a local hospital, but his offer was rejected. J.A. 159, 353-54. Instead, DIHS's records falsely characterized Masters as stating that the "elective procedures this patient may need in the future are cytoscopy and circumcision," J.A. 161, and failed to document either his conclusion that a biopsy was needed to rule out cancer or his offer to admit Castaneda for treatment.[6]

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[6] Petitioner Gonsalves claims that Masters returned Castaneda to SDCF without providing "the authorized test and treatment." Gonsalves Br. 8-9. The reality is that DIHS did not accept Masters's offer to admit Castaneda to a local hospital for treatment and, instead, mischaracterized and omitted some of his recommendations in its records. Citing the same records, the district court noted below that Petitioners may have "lied about [outside doctors'] recommendations" and "purposefully

(Continued on following page)

A week after Masters's examination, Castaneda received a memo from Petitioner Gonsalves that said the "surgical intervention" recommended by the "off-site specialist" was "elective in nature"; "[a]n independent review by our medical team is in agreement with the specialist's assessment"; and the care Castaneda was receiving was "appropriate and in accordance with our policies." J.A. 167-68. Gonsalves's representation that the "off-site specialist" described the surgical intervention as "elective" was false and directly conflicts with the medical records of Wilkinson, Masters, and even Hunting (who recommended resection). J.A. 115-24, 139-40, 148, 156-60, 355.

Castaneda's condition continued to deteriorate. After an SDCF detention officer informed medical staff that Castaneda had blood on his boxer shorts, Walker sought authorization for Castaneda's surgery, but DIHS denied the request. J.A. 172, 173-77.[7] By November 15, Castaneda's lesion had grown, his boxer shorts were stained with blood and discharge, and he could no longer urinate while standing because the urine "spray[ed] everywhere." J.A. 179-80, 183-84. His weekly allotment of boxer shorts was increased. J.A. 183-84.

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mischaracterized" Castaneda's medical conditions as "elective" to justify refusing him care. Pet. App. 78a-80a.

[7] DIHS denied the request, even though it acknowledged that Castaneda was a "mandatory hold" due to his immigration status and "may be with this facility for quite a while." J.A. 177.

Soon afterwards, ICE transferred Castaneda to San Pedro Service Processing Center, listing no current medical problems. J.A. 358-59. In early December, ACLU attorneys began advocating to get Castaneda the biopsy that had been recommended approximately eight months earlier. J.A. 359-60. As a result, urologist Lawrence Greenberg, M.D., examined Castaneda, describing his penis as "a mess" and stating that he required surgery. J.A. 360-61. Over a month later, urologist Asghar Askari, M.D., examined Castaneda and determined that Castaneda "most likely [had] penile cancer." J.A. 191-93, 362-63.

DIHS finally scheduled the biopsy that had been recommended nearly ten months earlier, but ICE abruptly released Castaneda on February 5, a few days before the biopsy was to occur. J.A. 363; SER 194-96. Castaneda went to the ER of Harbor-UCLA Hospital in Los Angeles on February 8, where he was diagnosed with squamous cell carcinoma of the penis. J.A. 363. His penis was amputated on February 14. *Id.* The amputation did not occur in time to save his life, as the cancer had spread and did not respond to numerous rounds of chemotherapy. J.A. 364. Castaneda died on February 16, 2008. *Id.*

B. Statutory Background

This case involves two federal statutes addressing the scope of immunity afforded to PHS personnel: 42 U.S.C. § 233 and 28 U.S.C. § 2679(b).

Congress enacted 42 U.S.C. § 233 as part of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868. The immunity provision in § 233(a) was a response to the Surgeon General's request that PHS personnel receive protection from ordinary malpractice liability. *See* 91 Cong. Rec. H42543 (daily ed. Dec. 18, 1970) (statement of Rep. Staggers, House sponsor of bill) (noting that the Surgeon General requested the amendment because PHS doctors "cannot afford to take out the customary liability insurance as most doctors do").

Congress addressed this issue by making an action against the United States under the FTCA—a statute designed to protect federal employees from common-law tort liability—the "exclusive" remedy for people injured by PHS officials' malpractice. Section 233(a) provides:

> DEFENSE OF CERTAIN MALPRACTICE AND NEGLIGENCE SUITS
>
> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 . . . for damage for personal injury, including death, resulting from the performance of medical . . . or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or

> proceeding by reason of the same subject-matter against the officer or employee . . . whose act or omission gave rise to the claim.

42 U.S.C. § 233(a).[8]

It was not until the following year that this Court decided *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971), a case charging federal agents with constitutional violations under the Fourth Amendment and permitting, for the first time, a constitutional damages claim against them. Prior to *Bivens*, no reported decision had allowed constitutional damages claims against federal officials.

Five years later, in 1976, this Court decided *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976), which recognized an Eighth Amendment claim against state officials under 42 U.S.C. § 1983, based on their deliberate indifference to a prisoner's serious medical needs. Prior to *Estelle*, this Court had not recognized an Eighth Amendment claim for a prisoner's inadequate medical care.

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[8] Section 233(a) was modeled on the now-repealed Federal Drivers Act, adopted in 1961. *See* Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. § 2679(b) (1982)). Congress also adopted similar immunity statutes to protect other federal medical personnel, including the Gonzalez Act, 10 U.S.C. § 1089 (Army medical personnel), and 38 U.S.C. § 7316 (Veterans' Administration medical personnel).

In 1980—ten years after Congress enacted § 233(a)—*Carlson v. Green*, 446 U.S. 14, 18-19 (1980), held that such claims are actionable against federal officials under *Bivens*. In *Carlson*, the federal defendants were medical personnel employed by the federal Bureau of Prisons ("BOP") and the PHS.[9] This Court found the FTCA inadequate to remedy the Eighth Amendment violation at issue, which had resulted in the death of a federal prisoner, and found it "crystal clear" that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. at 20.

Eight years later, in 1988, Congress amended the FTCA in response to this Court's decision in *Westfall v. Erwin*, 484 U.S. 292, 299 (1988), which held that federal employees were not entitled to absolute immunity from common-law torts committed in the scope of their employment. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4653 (codified at 28 U.S.C. §§ 2671-80). As amended, the FTCA provides:

> (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act . . . of any employee

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[9] Assistant Surgeon General Robert T. Brutshe, a PHS officer, was one of the defendants. *See* Resp. App. 69a, 73a-74a, Compl., *Carlson v. Green*, 446 U.S. 14 (1980) (No. 78-1261).

> of the Government . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee. . . . Any other civil action . . . arising out of or relating to the same subject matter against the employee . . . is precluded. . . .
>
> (2) *Paragraph (1) does not extend or apply to a civil action against an employee of the Government –*
>
> *(A) which is brought for a violation of the Constitution of the United States. . . .*

28 U.S.C. § 2679(b)(1)-(2) (emphasis added). As the italicized language shows, although the FTCA provides all federal employees with immunity from common-law torts, it simultaneously preserves personal liability for constitutional violations—*i.e.*, *Bivens* actions.

Section 233 depends on the FTCA for much of its effect. Section 233(a) explicitly refers to the "remedy against the United States provided by sections 1346(b) and 2672 of title 28"—*i.e.*, the FTCA remedy—and provides that, where PHS officials cause certain types of damage, the FTCA remedy against the United States is exclusive. 42 U.S.C. § 233(a). The "exclusive remedy" of § 233(a) is explicitly subject to § 1346(b), which, in turn, is "[s]ubject to the provisions of chapter 171" of title 28. 28 U.S.C. § 1346(b). Chapter 171 codifies the Westfall Act, 28 U.S.C. §§ 2671-80, and the Westfall Act, in turn, expressly preserves *Bivens* remedies in § 2679(b)

("The [exclusive] remedy against the United States provided by [the FTCA] . . . *does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States*") (emphasis added).

Petitioners' position is that § 233(a) affords them immunity from *Bivens* actions, notwithstanding that all other federal employees—including their BOP counterparts—are subject to *Bivens* liability.

C. Proceedings Below

Castaneda filed this action on November 2, 2007. Pet. App. 8a. He died three months later and his sister and personal representative, Yanira Castaneda, and his minor daughter and sole heir, Vanessa Castaneda, were substituted as Plaintiffs. *Id.* They assert FTCA claims against the United States; *Bivens* claims against federal officials alleging Fifth and Eighth Amendment violations for deliberate indifference to Castaneda's serious health needs; 42 U.S.C. § 1983 and common-law malpractice claims against state officials; and a malpractice claim against a private physician who examined Castaneda while he was in ICE custody. J.A. 377-404.

On January 14, 2008, Petitioners moved to dismiss the *Bivens* claims, arguing that, under 42 U.S.C. § 233(a), the FTCA provided the exclusive remedy, and certifying under 28 U.S.C. § 2679(d)(1) and 42 U.S.C. § 233(a) that Petitioners had acted

within the scope of their employment. Pet. App. 8a-9a; J.A. 34.

The district court denied the motion, concluding that § 233(a), through its reference to FTCA provisions, "incorporates the provision of the FTCA [28 U.S.C. § 2679 (b)(2)(A)] which *explicitly* preserves a plaintiff's right to bring a *Bivens* action." Pet. App. 59a-61a (emphasis in original).

The district court also observed that the evidence the Plaintiffs had "already produced at this early stage in the litigation is more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions." *Id.* at 75a. The court concluded its opinion by noting: "Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate." *Id.* at 80a n.16.

Petitioners filed an interlocutory appeal of the district court's immunity ruling. Soon thereafter, the government filed a Notice of Admission of Liability for Medical Negligence, admitting liability and causation on Respondents' medical negligence claim against the United States. J.A. 328-29.

The court of appeals affirmed the denial of *Bivens* immunity. Pet. App. 1a-40a. The court turned to *Carlson*, 446 U.S. 14, as "the starting point" for its analysis. Pet. App. 10a. It examined § 233(a) under *Carlson*'s two-factor test for *Bivens* preemption,

which places the burden on the party asserting preemption to demonstrate either (1) "special factors counselling hesitation in the absence of affirmative action by Congress" or (2) "that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* (quoting *Carlson*, 446 U.S. at 18-19) (emphasis in original).

Noting *Carlson*'s conclusion that Congress does not view the FTCA as providing relief that is "equally effective" as *Bivens* relief, the court found "no basis" for distinguishing *Carlson* here. Pet. App. 13a-14a. The court also concluded that § 233(a) does not contain any "explicit declaration" that Congress intended to provide PHS personnel immunity from *Bivens*. *Id.* at 19a. The court found support for this conclusion in § 233(a)'s text, *id.*; the text of the FTCA, as amended by the Westfall Act, *id.* at 25a; the historical context in which § 233(a) was enacted, *id.* at 20a-23a; and the legislative histories of § 233(a) and the Westfall Act, *id.* at 22a, 26a-28a.

Finally, the court concluded, in accordance with *Carlson*, that there are no "special factors" precluding a *Bivens* action. *Id.* at 37a-39a (quoting *Carlson*, 446 U.S. at 18).

SUMMARY OF ARGUMENT

Francisco Castaneda died after enduring eleven months of treatment at the hands of PHS officials for which, in the district court's words, "the moniker 'cruel' is inadequate." Pet. App. 80a. The question presented in this case is whether his family will be able to seek justice from the individuals who perpetrated that conduct—Petitioners here—or whether Petitioners are immunized from liability for constitutional violations by 42 U.S.C. § 233(a), a statute that was enacted the year *before* the right to sue for constitutional violations came into existence. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In light of the plain language of § 233(a); other provisions of the statute; numerous other indicia of congressional intent; the historical context in which § 233(a) was enacted; and this Court's own post-*Bivens* jurisprudence, the answer to this question is "no."

First and foremost, Petitioners' attempt to evade liability for one of the "most egregious Eighth Amendment violations the [district court] ha[d] ever encountered," Pet. App. 74a, is defeated by the plain language of § 233(a), which makes clear that Congress did not intend to provide PHS officials with immunity from *Bivens* actions. That provision is expressly subject to Section 1346(b) of the FTCA—which, in turn, is "[s]ubject to the provisions of chapter 171" of title 28. 28 U.S.C. § 1346(b). Chapter 171 codifies the Westfall Act, 28 U.S.C. §§ 2671-80, which expressly preserves *Bivens* actions: "*the remedy*

against the United States provided by [the FTCA] . . . does not extend or apply to a civil action against an employee of the government . . . which is bought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Because the immunity conferred by § 233(a) is expressly subject to the italicized language from the Westfall Act—language that indisputably excepts *Bivens* actions from the scope of immunity for all federal employees—Petitioners' immunity argument falters right from the start.

Other provisions of § 233 confirm this interpretation. First, § 233(c)—known as the "scope certification" provision—speaks volumes by what it does *not* include: a mechanism by which a federal employee's bid for immunity in a federal court action is triggered. A federal employee may not claim personal immunity under an "exclusive remedy" provision until the government or a district court certifies that an employee was acting within the scope of his employment when committing the tort from which the suit arose. 28 U.S.C. § 2679(d). Section 233(c), however, does not contain any procedure for a scope certification where a PHS officer faces a federal court action, which forces federal employees—including Petitioners here—to seek scope certification under a provision of the FTCA, 28 U.S.C. § 2679(d), that is itself subject to the FTCA's express preservation of *Bivens* actions against all federal employees. *Id.* The fact that § 233(c)—by virtue of its lack of an applicable scope certification provision—obligated Petitioners to use a certification provision

in the FTCA that itself is subject to the FTCA's *Bivens* exception defeats any argument that § 233(a) was intended to immunize PHS personnel from *Bivens* claims.

Section 233(f)'s "insure-or-indemnify" provision, which authorizes the government to indemnify or provide liability insurance for PHS personnel under certain circumstances, further confirms that § 233(a)'s exclusivity language permits *Bivens* actions. The inclusion of such a provision within § 233 is proof positive that Congress never intended to immunize PHS officials from *all* liability because, absent liability, there would be no need for indemnification or insurance.

Numerous other indicia of Congressional intent confirm that § 233(a) does not create any immunity from *Bivens* claims. For one, the title of § 233(a)—"Defense of Certain Malpractice and Negligence Suits"—unambiguously conveys that § 233(a) immunity extends to certain "malpractice" and "negligence" actions only, not actions asserting constitutional torts. Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868. Equally telling is the fact that § 233(a) was enacted before any constitutional tort action against federal employees had even been recognized by this Court. (*Bivens* was decided the year *after* § 233(a) was passed. *See* 403 U.S. at 389.) The legislative history of the Westfall Act—which includes an amendment to the FTCA that explicitly preserves the right to sue federal employees under *Bivens*—further confirms that Congress's sole

intent in enacting § 233(a) and similar immunity statutes was to provide federal employees immunity from common-law tort actions, not *Bivens* actions. Petitioners' contrary interpretation, which is at odds with every available indicia of Congressional intent, would mean that of all the federal employees in this country, only PHS employees are immune from *Bivens* liability—an anamolous result that Congress could not reasonably have intended.

Even if § 233(a) did not incorporate § 2679(b)'s express preservation of *Bivens* remedies (which it does), Petitioners' immunity argument would still fail because the immunity provision of the FTCA—28 U.S.C. § 2679(b)—applies on its face to all federal employees—including PHS personnel. Petitioners cannot escape the reach of this statute—and its express preservation of *Bivens* remedies—by arguing that it impliedly repeals § 233(a), because the two statutes are capable of coexistence, and thus, the Court must give effect to both. *See Things Remembered, Inc. v. Petraca*, 516 U.S. 124, 129 (1995).

Finally, this Court's jurisprudence—in particular, *Carlson v. Green*, 446 U.S. 14 (1980)—mandates a holding that § 233(a) does not immunize Petitioners from *Bivens* liability. *Carlson* held—in a case functionally equivalent to this one—that it is "crystal clear" that Congress does not intend the FTCA remedy to substitute for a *Bivens* remedy. 446 U.S. at 20. This case creates an even stronger basis for rejecting immunity than *Carlson*, which was decided before the Westfall Act explicitly preserved *Bivens*

actions against all federal employees. In addition, all of the various factors relied on by the *Carlson* Court to support its conclusion—including the absence of both an equally effective federal remedy and special factors counselling hesitation against the recognition of a *Bivens* remedy—are satisfied here in spades. If Petitioners are granted the immunity they seek, Castaneda's family will be relegated to damages that do nothing to compensate them for the unspeakable suffering Castaneda endured at the hands of PHS officials. This Court should not conclude this "Kafkaesque nightmare," Pet. App. 24a n.12, by depriving his family of their right to seek a full and effective remedy for their—and his—immeasurable losses.

ARGUMENT

I. SECTION 233 PRESERVES *BIVENS* CLAIMS AGAINST PHS OFFICIALS.

A. The Plain Language Of § 233(a), Which Incorporates The FTCA And Its Exclusivity Provision, Preserves *Bivens* Claims Against PHS Officials.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 233(a) starts with a cross-reference to the FTCA:

> *The remedy against the United States provided by sections 1346(b) and 2672 of title 28* [the FTCA] . . . for damage for personal injury, including death, resulting from the performance of medical . . . or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee . . . whose act or omission gave rise to the claim.

42 U.S.C. § 233(a) (emphasis added).[10]

The italicized language reveals that Congress did *not* intend to provide PHS officials with immunity from *Bivens* actions. The "exclusive remedy" of § 233(a) is expressly subject to § 1346(b), which, in turn, is "[s]ubject to the provisions of chapter 171" of title 28. 28 U.S.C. § 1346(b). Chapter 171 codifies the Westfall Act, 28 U.S.C. §§ 2671-80, which, in turn, preserves a *Bivens* remedy: "The [exclusive] remedy against the United States provided by [the FTCA] . . . *does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States.*" 28

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[10] The italicized reference to "sections 1346(b) and 2672 of title 28" is the common convention for referring to the entire FTCA. *See, e.g.*, Gonsalves Br. 23; U.S. Br. 9; *United States v. Smith*, 499 U.S. 160, 165-66 (1991) (replacing similar immunity statute's reference to these section numbers with "[the FTCA]").

U.S.C. § 2679(b)(1)-(2)(A) (emphasis added). Because § 233(a) incorporates the FTCA provision that expressly preserves a *Bivens* remedy, this Court need look no further than the plain language of the statute to resolve the question presented in Respondents' favor.[11]

To avoid the inevitable result of following § 233(a)'s statutory trail, Petitioner Gonsalves and the United States argue that § 233(a) does not incorporate the FTCA's express preservation of *Bivens* remedies because § 233(a) refers to the FTCA only in describing the scope of the remedy against the

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[11] This Court has long recognized the importance of examining statutory provisions incorporated by reference to ascertain the plain meaning of a statute. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 66 (2000) (interpreting the Age Discrimination in Employment Act ("ADEA") to apply to State employers because of later amendments to the Fair Labor Standards Act that were incorporated by reference in the ADEA); *U.S. Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495 (1994) (following "a somewhat convoluted path of statutory cross-references" to determine whether disclosures of employees' personal information under the Federal Service Labor-Management Relations Statute constitutes a "clearly unwarranted invasion" of the employees' privacy within the meaning of the Freedom of Information Act); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (noting that "cross-references [between different parts of the Social Security Act] illustrate Congress's intent that [those parts] operate together closely to provide uniform levels of support for children of equal need"); *County of Washington v. Gunther*, 452 U.S. 161 (1981) (interpreting the scope of Title VII, which proscribes employment discrimination, in light of the Equal Pay Act ("EPA"), after an amendment to Title VII cross-referenced the EPA).

United States—not the scope of immunity afforded to PHS personnel—and § 2679(b)(2)(A) is not part of that remedy. Gonsalves Br. 37-38; U.S. Br. 21-22. Setting aside the fact that § 233(a) incorporates the *entire* FTCA, this strained parsing of § 233(a)'s reference to the FTCA lacks merit.[12] As explained below, examining § 233 as a whole demonstrates that § 233(a) preserves *Bivens* claims.

B. Other Provisions Of § 233 Confirm That § 233(a) Preserves *Bivens* Claims.

Petitioners' reliance on one statutory phrase in § 233(a)—"exclusive of any other civil action"—shows a "regrettable penchant for construing words in isolation." *Deal v. United States*, 508 U.S. 129, 133 (1993). It is well-established that the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) (holding that

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[12] Section 233(a) is subject to Chapter 171 of the FTCA in its entirety, including § 2679(b)'s *Bivens* exception, because of § 233(a)'s reference to § 1346(b). *See, e.g., Parrott v. United States*, 536 F.3d 629, 634 (7th Cir. 2008) ("Section 1346(b) is subject to chapter 171 in its entirety, not to [one subsection of the FTCA] specifically"). Indeed, much of the PHS Act's function depends on Chapter 171, which includes provisions on administrative adjustment of claims, exhaustion of administrative remedies, settlement, and exceptions to the FTCA's coverage. 28 U.S.C. §§ 2671-80.

the phrase "negligent transmission" in 28 U.S.C. § 2680(b) does not include "all" negligence occurring in the course of mail delivery); *see also United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (holding that a reference to "any" law enforcement officer cannot be construed broadly "without considering the rest of the statute"). Here, when § 233(a)'s exclusivity language is interpreted in the context of § 233 as a whole—particularly subsections (c) and (f)—it is clear that § 233(a) does not preclude *Bivens* actions, let alone *all* civil actions, as Petitioners claim.

1. Section 233(c)

Section 233(c) supports this interpretation of § 233(a) by virtue of what it does *not* contain. This subsection, commonly known as the "scope certification" provision, allows the United States to substitute as a defendant after certifying that an employee was acting within the scope of employment when committing the common-law tort from which the suit arose. 42 U.S.C. § 233(c). However, § 233(c) does *not* contain any procedure for a scope certification where a PHS official faces a *federal* court action. Instead, it is limited to actions filed in *state* court and permits removal to federal court upon certification. *Id.*

The absence of a scope certification provision in § 233(c) for federal court actions is proof positive that Congress did not intend § 233(a) to immunize PHS personnel from *Bivens* liability. A federal employee

may not claim personal immunity under an "exclusive remedy" provision—such as § 233(a) or § 2679(b)—until the government or a district court provides a scope certification. 28 U.S.C. § 2679(d). Because § 233 does not contain a scope certification provision for the types of claims asserted here, federal employees, including PHS personnel, must seek scope certification under 28 U.S.C. § 2679(d) of the FTCA—which, unlike § 233(c)—*does* provide a scope certification procedure for federal defendants who face federal court actions. 28 U.S.C. § 2679(d)(1).[13]

Because § 233(c) does not permit scope certification in federal cases, Petitioners here invoked 28 U.S.C. § 2679(d) as the basis for their immunity defense. J.A. 34. But Petitioners' reliance on § 2679(d) itself defeats their immunity argument—and their interpretation of § 233(a). This is because § 2679(d),

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[13] Section 2679(d)(1) provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). The FTCA also contains a scope certification provision applicable to state court actions, which provides for removal to federal court upon certification. 28 U.S.C. § 2679(d)(2).

like § 233(a), is subject to the FTCA's express preservation of a *Bivens* remedy for all federal employees. Section 2679(d)(4) states that scope certification "*shall be subject to the limitations and exceptions* applicable to" actions brought against the United States under the FTCA. 28 U.S.C. § 2679(d)(4) (emphasis added).[14] One such "*limitation[] and exception[]*" is § 2679(b), which is the express preservation of *Bivens* actions against all federal employees. *See Smith*, 499 U.S. at 166 (noting that the "limitations and exceptions" referenced in § 2679(d)(4) include the exceptions in § 2679(b)). Therefore, by virtue of the fact that Petitioners sought scope certification pursuant to § 2679(d), Petitioners are "subject to" the FTCA's express preservation of *Bivens* remedies in § 2679(b).

Petitioners, however, want to have their cake and eat it too. On the one hand, because § 233(a) does not contain a scope certification provision by which they could claim immunity, Petitioners invoked the FTCA's scope certification provision instead. Having availed themselves of that provision, however, Petitioners simultaneously contend that they are not subject to the FTCA's *Bivens* exception, even though that provision is incorporated by reference into

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[14] Petitioners relied on § 2679(d)(4) as a basis for the motion to dismiss that led to this appeal. *See* Defs.' Notice of Mot. and Mot. to Dismiss for Lack of Jurisdiction; Mem. of P. & A. in Support Thereof at 10, *Castaneda v. United States*, 538 F. Supp. 2d 1279 (C.D. Cal. 2008) (No. CV 07-07241 DDP (JC)).

§ 2679(d). Petitioners' reliance on this sort of statutory gamesmanship as the basis for their immunity defense only underscores the weakness of their position.[15]

2. Section 233(f)

Section 233(f)'s "insure-or-indemnify" clause further confirms that § 233(a)'s exclusivity language does not bar all actions against PHS officials and, indeed, permits *Bivens* actions. Section 233(f) authorizes the government to indemnify or provide liability insurance for PHS personnel assigned to a

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[15] Petitioners also try to escape the reach of the FTCA's *Bivens* exception by arguing that the FTCA's judgment-bar provision, 28 U.S.C. § 2676, shows that § 233(a) bars *Bivens* claims. Gonsalves Br. 26; *see also* U.S. Br. 11-12, 15 (same). This is an apples and oranges comparison. *See, e.g., Will v. Hallock*, 546 U.S. 345, 354 (2006) (noting that § 2676 is not analogous to an immunity statute, "but [rather] the defense of claim preclusion, or res judicata"). As the Seventh Circuit explained, because "'Congress views FTCA and *Bivens* as parallel, complementary causes of action,' . . . [a] plaintiff may still bring both parallel claims as remedies to torts committed by law enforcement officers against the government and the individual officers, and the remedies complement each other. But the idea that a plaintiff may bring claims against both the government and the federal officer does not directly implicate whether one may pursue those claims to judgment." *Manning v. United States*, 546 F.3d 430, 434-45 (7th Cir. 2008), *cited in* Gonsalves Br. 26; *see also Serra v. Pichardo*, 786 F.2d 237, 241 (6th Cir. 1986), *cited in* Gonsalves Br. 26 (noting that the issue of whether "a *Bivens* remedy is available to a plaintiff even though plaintiff's allegations also could have supported [an FTCA claim]" has no bearing on "the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy").

foreign country or non-profit institution and in circumstances "likely to preclude the remedies of third persons against the United States [under the FTCA]." 42 U.S.C. § 233(f). Section 233(f) provides:

> The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical . . . or related functions . . . if such employee is assigned to a foreign country . . . or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in [the FTCA] for such damage or injury.

Id. This provision anticipates that, when an injured party does not have a remedy against the United States under the FTCA, he may sue a PHS official individually. The PHS official's protection in those circumstances is not immunity from suit; rather, it is indemnification or insurance, at the federal agency's discretion.

The fact that Congress included an indemnification and insurance provision in § 233(f) is powerful confirmation that it never intended to immunize PHS officers from all liability, as Petitioners claim. The reason is simple: absent liability, there would be no

need for indemnification or insurance. The legislative history of virtually identical immunity statutes confirms this. Congress explained that the purpose of the "insure-or-indemnify" clause of the Gonzalez Act, 10 U.S.C. § 1089, an immunity statute modeled on § 233, " . . . is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable." S. Rep. No. 94-1264 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4443, 4450-51; *see also* H.R. Rep. No. 93-368 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1688, 1710 (describing the purpose of the "insure-or-indemnify" clause in the virtually identical VA immunity statute, 38 U.S.C. § 7316, as extending "protection to cases where Federal Tort claims actions would not lie, but actions could still be brought against the VA employee personally for actions arising in the exercise of his duties").[16]

The fact that Congress saw fit to include an insurance and indemnification provision in § 233(f) is also conclusive evidence that § 233(a) does not apply to *Bivens* claims. This is because § 233(f) offers PHS officials protection in the form of indemnification and

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[16] Petitioner Gonsalves and the United States note that the Gonzalez Act was modeled on § 233. Gonsalves Br. 33; U.S. Br. 16. The Gonzalez Act authorizes the government to indemnify or provide liability insurance for medical personnel when assigned to a foreign country and in circumstances "likely to preclude the remedies of third persons against the United States [under the FTCA]." 10 U.S.C. § 1089(f). The VA immunity statute likewise authorizes the same. 38 U.S.C. § 7316(e).

insurance when there is no remedy against the United States, and there has never been a remedy against the United States, or a U.S. agency, for *Bivens* actions. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 473 (1994) (holding that constitutional claims are not cognizable under the FTCA and declining to extend *Bivens* to a federal agency). Indeed, the FTCA makes clear that the United States' exclusive remedy provision extends only to common-law tort liability, not to *Bivens* actions. 28 U.S.C. § 2679(b)(1)-(2).

Although no court has interpreted the "insure-or-indemnify" clause in the context of a *Bivens* claim, four of the five appeals courts to construe the clause in the context of a common-law tort claim have held that, despite the exclusive remedy language in subsection (a), medical personnel could be sued for malpractice committed abroad because the FTCA precluded a remedy against the United States under 28 U.S.C. § 2680(k). *See, e.g., Smith v. Marshall*, 885 F.2d 650, 651-55 (9th Cir. 1989), *rev'd in part on grounds not relevant here*, *Smith*, 499 U.S. 160 (holding that neither the Gonzalez Act nor the Westfall Act barred a malpractice claim against an Army doctor because there was no remedy under the FTCA, due to the foreign tort exception in § 2680(k)); *Newman v. Soballe*, 871 F.2d 969, 977 (11th Cir. 1989), *abrogated in part by Smith on grounds not relevant here*, 499 U.S. 160 (same); *Pelphry v. United States*, 674 F.2d 243, 246 (4th Cir. 1982) (holding that the Gonzalez Act did not bar a malpractice claim

against an Army doctor because there was no FTCA remedy under § 2680(k)); *Jackson v. Kelly*, 557 F.2d 735, 740-41 (10th Cir. 1977) (same); *but see Powers v. Schultz*, 821 F.2d 295, 297-98 (5th Cir. 1987) (interpreting 10 U.S.C. § 1089(f) and finding that Congress did not intend to expose military doctors abroad to liability for malpractice). Given that the majority of appeals courts found that the exclusivity language in pre-Westfall Act immunity statutes like § 233(a) did not even bar certain common-law malpractice claims, such language certainly could not bar *Bivens* claims.

The Westfall Act altered the "insure-or-indemnify" provisions in pre-Act immunity statutes like § 233. Since the Westfall Act, federal employees are protected from personal liability, even if there is no remedy against the United States under the FTCA, with two exceptions—one of which is the *Bivens* exception. 28 U.S.C. § 2679(b)(2). This was made clear in *United States v. Smith*, which held that the Westfall Act bars any malpractice action in state or federal court against a foreign-based military physician, even when there is no remedy available against the United States. 499 U.S. at 166. The Court reached this conclusion based, in part, on the express preservation of employee liability under § 2679(b), including the preservation of *Bivens* claims. *Id.* at 166-67. This Court noted that, after the Westfall Act, insurance or indemnification against malpractice suits in domestic courts "is no longer needed." *Id.* at 172 n.15.

Smith, however, expressly declined to reach the issue of whether the Gonzalez Act, 10 U.S.C. § 1089, would have barred the action against the physician. 499 U.S. at 165 n.6.[17] At oral argument, however, the United States conceded that the Gonzalez Act would have permitted a malpractice suit against the foreign-based military physician and that the government would have been authorized to indemnify him under § 1089(f). Tr. of Oral Argument, *United States v. Smith*, 499 U.S. 160 (1991) (No. 89-1646), 1990 WL 601363, at *7-8. When asked to explain the relationship between the seemingly broad exclusivity language in § 1089(a) and the "insure-or-indemnify" clause in § 1089(f), the United States responded by noting that it was " . . . one of the puzzlements of this case that led us ultimately not to pursue the argument that the Gonzalez Act itself precludes this action," *id.* at *37-38, and by admitting that "the general language about the remedy being exclusive [in § 1089(a)] is susceptible of different readings," particularly when read "in conjunction with subsection (f)," *id.* at * 39; *see also id.* at *16 (where the government admits that it is "not clear from either the text of the act itself [10 U.S.C. § 1089] or its history to what extent that preclusion [from suit] was total").

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[17] Thus, *United States v. Smith* only overturned the lower court's ruling in *Smith v. Marshall*, 885 F.2d at 651-55, that the Gonzalez Act permitted a malpractice action otherwise barred by the Westfall Act. *United States v. Smith* abrogated part of *Newman's* holding, 871 F.2d at 977, on the same basis.

Despite its position in *Smith* that § 1089(a) would have permitted a malpractice suit against a miliary physician and that the statute is "susceptible of different readings," the United States argues here that the virtually identical exclusivity language in § 233(a) is "unambiguous and unqualified" and bars Respondents' *Bivens* actions. U.S. Br. 9. This inconsistency strips the United States' argument of any credibility. *See, e.g., Bates v. Dow Agrochemical*, 544 U.S. 431, 449 (2005) (rejecting the United States' argument, set forth in an *amicus* brief, that federal law preempts tort claims against a pesticide manufacturer; finding that the argument was "particularly dubious given that just five years ago the United States advocated the [opposite] interpretation"). Regardless, one thing is clear: § 233(f) shows that the immunity conferred by § 233(a) does not apply to *Bivens* claims.[18]

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[18] Similarly, § 233(e) shows that § 233(a) does not provide PHS officials with immunity from all civil actions. Section 233(e) waives the government's sovereign immunity for assault and battery committed by PHS officials. 42 U.S.C. § 233(e). The majority of courts construing § 233 and similar statutes have held that subsection (e) provides medical personnel with immunity from assault and battery that they would not enjoy under subsection (a) alone. *See, e.g., Franklin v. United States*, 992 F.2d 1492, 1500 (10th Cir. 1993) (construing 38 U.S.C. § 4116(a) to permit intentional tort suits against VA medical personnel prior to an amendment to the statute that added an intentional tort provision similar to § 233(e)); *Lojuk v. Quandt*, 706 F.2d 1456, 1463 (7th Cir. 1983), *cert. denied*, 474 U.S. 1067 (1986) ("[I]n 10 U.S.C. § 1089, 42 U.S.C. § 233, and 42 U.S.C. § 2458a, it is the presence of subsection (e) waiving the

(Continued on following page)

C. All Other Indicia Of Congressional Intent Confirm That § 233(a) Does Not Preclude *Bivens* Actions Against PHS Officials.

Numerous other indicia of Congressional intent reveal that § 233(a) does not preclude *Bivens* actions against PHS personnel. As explained below, the title of § 233(a), the historical context in which Congress enacted § 233(a), and the Westfall Act's legislative history all confirm that PHS officials—like all other federal employees—are subject to *Bivens* actions.

1. Title of § 233(a)

Although a statute's title cannot create ambiguities in its text, *Cornell v. Coyne*, 192 U.S. 418, 430 (1904), a title should be considered when it confirms the plain language of a statute and enables the Court to discern congressional intent, *Immigration and Naturalization Serv. v. Nat'l Ctr. For Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991). Here, the title of § 233(a)—"Defense of Certain Malpractice and Negligence Suits"—confirms that the immunity

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immunity of the United States for battery under Section 2680(h) that provides immunity for individual defendants in medical treatment cases"); *Leab v. Chambersburg Hosp.*, 230 F.R.D. 395, 396-97 (M.D. Pa. 2005) (adopting *Lojuk*'s reasoning that § 233(e) was not intended to immunize individual employees "from battery claims . . . unless a plaintiff had an alternative remedy against the United States under the FTCA"). Notably, *Lojuk* permitted the plaintiffs to proceed with a *Bivens* claim against a VA doctor. 706 F.2d at 1464, 1467-69.

conferred by § 233(a) extends to "malpractice" and "negligence" actions *only*, not actions sounding in constitutional tort.[19]

This Court has long recognized the distinction between constitutional torts on the one hand, and simple malpractice and negligence actions on the other. In *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), the Court explained that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Since *Estelle*, every U.S. Court of Appeals has issued equally clear statements demonstrating that "medical malpractice" alone can never rise to the level of a "deliberate indifference" constitutional claim. *See, e.g., Ruiz-Rosa v. Rullan*, 485 F.3d 150, 156 (1st Cir. 2009); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008); *Popoalii v. Corr. Med. Services*, 512 F.3d 488, 499 (8th Cir. 2008); *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006); *Self v. Crum*, 439 F.3d 1227, 1234 (10th Cir. 2006); *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004); *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004); *Bowman v. Corr. Corp. of Am.*, 350 F.3d 537, 544 (6th Cir. 2003); *Hinson v. Edmond*, 192

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[19] This is the statute's title as it appears in the public law, and neither Petitioners nor the United States contest that this is the operative title. Gonsalves Br. 30; Hui Br. 38-39; U.S. Br. 12.

F.3d 1342, 1345 (11th Cir. 1999); *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996); *Miltier v. Beorn*, 896 F.2d 848, 852 (4th Cir. 1990); *Redwood v. Council of the Dist. of Columbia*, 679 F.2d 931, 933 (D.C. Cir. 1982). Thus, when Congress chose the words "malpractice" and "negligence" to describe the immunity provided in § 233(a), it plainly did not speak to constitutional torts.[20]

Moreover, the fact that Congress included the qualifier "certain" in § 233(a)'s title demonstrates that Congress intended to provide PHS personnel with immunity from some—but not all—malpractice and negligence suits. *See, e.g., El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 173 (1999) (noting that the "[i]nclusion of the word 'certain'" in a title "accurately indicated" a concern with "certain rules only, not with all rules") (citation omitted). Thus, Congress never even intended for § 233(a) to provide immunity from all types of common-law tort actions, let alone constitutional tort actions.

Petitioners' reliance on *Webster's Dictionary* in support of their contention that "malpractice" encompasses constitutional torts is singularly unpersuasive. Gonsalves Br. 19; Hui Br. 39-40; *see also* U.S. Br. 13. Aside from the fact that the common law is the proper

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[20] Notably, Petitioners moved to dismiss this case on the ground that "Plaintiff's claims form the basis for a medical malpractice action (a non-constitutional tort claim) against the United States, and not a *Bivens* claim against each Public Health Service Defendant." *See* Defs.' Mot. to Dismiss at 8.

source for determining the meaning of an undefined term, *Scheidler v. Nat'l Org. For Women*, 537 U.S. 393, 402 (2003), if any dictionary is to be consulted, it should be *Black's Law Dictionary*. *Black's Law Dictionary* confirms that "malpractice" is "[a]n instance of negligence or incompetence on the part of a professional," in contrast to a "constitutional tort," which is "[a] violation of one's constitutional rights by a government officer, redressable by a civil action filed directly against the officer." *Black's Law Dictionary* (8th ed. 2004).[21]

In short, the title of § 233(a), which explains that the immunity afforded PHS personnel extends *only* to "certain malpractice and negligence suits," confirms that Congress never intended to preclude *Bivens* actions.

2. Historical Context

It is well-established that, to determine the meaning of a statute, this Court examines the historical context in which the statute was enacted.

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[21] Petitioner Gonsalves argues that "[w]hile every instance of malpractice does not rise to the level of deliberate indifference under the Constitution, acts of deliberate indifference by medical personnel do constitute malpractice." Gonsalves Br. 29. This is like equating manslaughter with murder. There is a dead body in both cases, but the "intent" makes all the difference in the character of the wrongdoing. Just as manslaughter is a lesser included offense of murder, malpractice is a "lesser included offense" of deliberate indifference.

Branch v. Smith, 538 U.S. 254, 268-69 (2003); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 134 (2001). Placing § 233(a) in its historical context further confirms that Congress never intended to immunize PHS personnel from *Bivens* actions.

When Congress passed § 233(a) on December 31, 1970, *see* Pub. L. No. 91-623, victims of constitutional torts had *no authority* to bring suits against federal employees for constitutional violations. As explained above, the remedy for constitutional violations by federal employees did not even exist until June 21, 1971, when this Court decided *Bivens* and *created* a remedy for those injured by federal employees' unconstitutional conduct. *Bivens*, 403 U.S. at 389. Moreover, § 233(a) was enacted before *Estelle* recognized an Eighth Amendment claim based on the deliberate indifference to a prisoner's serious medical needs and before *Carlson* held that these claims apply to federal officials. Congress plainly could not have intended § 233(a) to preclude claims that would not be cognizable until years later, after the claim was fully developed by the Court's *Bivens* jurisprudence, especially given all other indicia of congressional intent confirming that § 233(a) covered "malpractice and negligence" actions only.

The first time Congress spoke to the issue of *Bivens* was in 1988, when it amended the FTCA to explicitly *preserve Bivens* actions against all federal employees. 28 U.S.C. § 2679(b)(2). Because the "remedy" against PHS personnel in § 233(a) is only

"exclusive" to the extent provided by the FTCA, Congress did not need to take any further action to amend § 233(a): the preservation of *Bivens* actions was effectuated by the amendments to the FTCA's remedy provisions, which are incorporated into § 233(a) by the first sentence of that statute. Against this backdrop, the only plausible interpretation of § 233(a) is that it incorporates § 2679's express preservation of *Bivens* remedies.

The United States' argument that "Congress may well have been aware of the concept of a constitutional tort when it enacted Section 233(a) in December 1970" does not withstand scrutiny. U.S. Br. 16 (citing *Bell v. Hood*, 327 U.S. 678, 684-85 (1946)). *Bell* declined to rule on the appropriateness of a remedy against federal employees for Fourth Amendment violations, and the district court on remand held that no such cause of action existed. *See* 71 F. Supp. 813, 817 (S.D. Cal. 1947). Between *Bell* and *Bivens*, no reported decision had held that a claim against federal officials existed for constitutional violations. Congress therefore could not "have been aware" of the concept of a constitutional tort claim when it enacted § 233(a). Instead, as its title confirms, the statute was merely intended to accomplish one simple goal: to immunize PHS personnel from some (and not even all) common-law tort claims.

3. Legislative History

Any remaining doubts concerning whether the express preservation of *Bivens* remedies in the Westfall Act applies to PHS personnel is resolved by looking at the Westfall Act's legislative history, which confirms that Congress viewed § 233(a) as providing immunity for common-law tort actions only, not *Bivens* actions.

Congress viewed the Westfall Act as restoring the *status quo* to before the Court's decision in *Westfall v. Erwin*, 484 U.S. 292, 299 (1988), which held that federal employees were not entitled to absolute immunity for common-law torts committed in the scope of their employment. The substance of *Westfall* is not pertinent here, but the decision warrants attention because it prompted Congress to clarify, for the first time since *Bivens*, the circumstances under which federal employees are immune from liability for common-law torts. The House Judiciary Committee stated that the Westfall Act "*would not affect* the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights") (emphasis added). H.R. Rep. No. 100-700, at 6 (1998), *reprinted in* 1988 U.S.C.C.A.N. 5945; *see also* 134 Cong. Rec. 29933 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley) (noting that "this bill does not have any effect on the so-called Bivens cases or Constitutional tort claims, . . . *which can continue to be brought against individual Government officials*") (emphasis added); *Legislation to Amend the Federal Tort Claims*

Act: Hearing Before the Subcomm. on Administrative Law and Government Relations of the H. Comm. on the Judiciary, 100th Cong. 78-79 (1988) ("House Hearings") (statement of Robert Willmore, Deputy Assistant Attorney General) (noting that "[t]here is no change, however, in [the government's] long-standing belief that persons whose constitutional rights have been violated by scope-of-employment federal conduct should also be required to sue the United States, not the employee. . . . *[L]itigating Bivens cases will not much change as a result of Westfall, which changed the law only as it concerns common law torts.*") (emphasis added). In Congress's view, then, the Westfall Act merely extended to all federal employees the immunity that PHS personnel, among others, had enjoyed all along: immunity from common-law torts only.

In urging passage of the Westfall Act, Congress discussed other pre-Westfall Act immunity statutes—including § 233(a)—to show that a general grant of immunity to all federal employees was desirable. Each time Congress mentioned these pre-Westfall Act immunity statutes, it described them as providing immunity from common-law torts only—not all actions, and certainly not *Bivens* actions. *See, e.g.*, H.R. Rep No. 100-700, at 2 ("[T]he general rule applicable to Federal employees was that they were absolutely immune from personal liability in State common law tort actions for harm that resulted from activities within the scope of their employment."); House Hearings 75-76 (statement of Willmore)

("[M]ost federally employed physicians have only been protected from personal liability for claims alleging medical malpractice . . . and the United States has been able to develop a consistent and uniform approach to medical malpractice and automobile tort litigation—two of the most common types of common law torts."). In fact, the House Judiciary Committee specifically cited § 233(a) as an example of an earlier immunity statute that made the FTCA "the exclusive remedy for medical or dental malpractice" on the part of medical personnel. H.R. Rep. No. 100-700, at 4.

In short, the Westfall Act did "not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action; nor [did] it either expand or diminish rights established under other Federal statutes." *Id.* at 7. Prior to the Westfall Act, no court had held that § 233(a)—or any other similar immunity statute—provides federal medical personnel with immunity from *Bivens* actions, and the legislative history confirms that Congress too did not view § 233(a) as providing such expansive immunity to PHS personnel.

II. THE FTCA'S EXPRESS PRESERVATION OF *BIVENS* ACTIONS IN § 2679(b) IS DISPOSITIVE, REGARDLESS OF WHETHER § 233(a) INCORPORATES THAT PROVISION BY REFERENCE.

Petitioners' immunity argument would fail even if § 233(a) did not incorporate § 2679 by reference. The reason is simple: Congress's express preservation of *Bivens* remedies in § 2679(b)(2) applies on its terms to all federal employees—including PHS personnel. As *Smith* observed: "The [Westfall] Act's plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not." 499 U.S. at 173. Thus, Petitioners can be held liable under *Bivens* regardless of § 233(a)'s incorporation of the FTCA.

That § 233(a) and the FTCA confer overlapping immunities on PHS personnel does not alter this result. This Court "has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases." *Pioneer*, 534 U.S. at 144. Here, § 233 and the FTCA overlap, but they do, in fact, reach "distinct cases." The FTCA is a comprehensive statute that applies to *all* federal employees, including PHS personnel, and expressly preserves *Bivens* actions. Section 233, while applicable only to PHS personnel and silent with respect to *Bivens* actions, continues to reach "distinct cases" by providing PHS personnel with important protections they would not otherwise have under the

FTCA. These protections include the government's waiver of sovereign immunity in § 233(e) for assault and battery committed by PHS personnel; indemnification and insurance under § 233(f) for PHS personnel facing malpractice actions in foreign courts; and immunity from common-law torts under § 233(a) for private contractors, volunteers, and other entities "deemed" PHS employees by the Secretary of HHS. *See* § 233(g) (operators of health centers receiving federal funds); § 233(j) (officers, employees, or contractors of health center operators); § 233(m) (managed care plans that enter into contracts with health centers); § 233(o) (health professionals who volunteer at free clinics); § 233(p) (professionals who carry out smallpox countermeasures in the event of emergency).[22]

The FTCA and § 233 therefore can comfortably coexist and "do not pose an either-or proposition." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Things Remembered*, 516 U.S. at 129 (when statutes can "comfortably coexist," the Court must

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[22] Petitioner Hui argues that the language of 42 U.S.C. § 238q, the Good Samaritan statute that provides immunity for the use of defibrillators, makes a "distinction" between the immunity conferred by § 233 and the FTCA, and infers that the distinction must be that § 233 provides *Bivens* immunity, while § 2679 does not. Hui Br. 31-32. A far more plausible reading of this statute is that Congress wanted to ensure that § 238q did not waive *any* other immunity provided by *any* other statute applicable to health care professionals; as explained above, § 233 reaches a distinct set of cases that § 2679 does not. *See* § 233(g), (j), (m), (o), and (p).

"give effect to both"). It is of no consequence that § 233(a)'s exclusive remedy provision results in some redundancy when read with § 2679(b) because "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, . . . a court must give effect to both." *Germain*, 503 U.S. at 253 (citations omitted).

For example, the scope certification provision in § 2679(d)(2) made the scope certification provision in § 233(c) redundant by changing the certification process for state court actions. Likewise, the Westfall Act rendered part of § 233(f) superfluous, given this Court's observation about the virtually identical provision in § 1089(f) of the Gonzalez Act. *Smith*, 499 U.S. at 172 n.15 (noting that, after the Westfall Act, "insurance or indemnification against malpractice suits in *domestic* courts is no longer needed, but § 1089(f) still serves to protect foreign-based military personnel against malpractice suits in *foreign* courts") (emphasis in original). The redundancy resulting from the Westfall Act's impact on § 233(a) is of no more concern than the redundancy resulting from the Westfall Act's impact on § 1089(f), as both statutes continue to serve important functions.

Thus, construing § 233 and § 2679(b) together involves the "classic judicial task of reconciling . . . laws enacted over time, and getting them to 'make sense' in combination." *United States v. Fausto*, 484 U.S. 439, 453 (1988). This "necessarily assumes that the implications of a statute may be altered by the

implications of a later statute." *Id.* Just as *Fausto* found that the statute at issue remained "an operative part of the integrated statutory scheme set up by Congress to protect civil servants," *id.*, § 233 remains an "operative part" of the scheme Congress set up to protect federal employees from common-law tort suits.

This construction of § 233 and § 2679(b) does not create an "implied repeal" of § 233(a), as Petitioner Gonsalves and the United States contend. Gonsalves Br. 38; U.S. Br. 24. An implied repeal "will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch*, 538 U.S. at 273 (citations omitted); *see also Pioneer*, 534 U.S. at 142 ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.") (citation omitted). For all of the reasons stated above, there is plainly no "irreconcilable conflict" here, and therefore no implied repeal.

Even if this Court were to find an "irreconcilable conflict" between § 233(a) and the Westfall Act, the Westfall Act's express preservation of *Bivens* actions prevails. This is because the Westfall Act is a comprehensive statute that speaks specifically to the issue presented, while § 233(a) is silent. *See, e.g., United States v. Estate of Romani*, 523 U.S. 517, 532

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(1998) (holding that the Federal Tax Lien Act governed over the federal priority statute because "the Tax Lien Act is the *later statute, the more specific statute, and its provisions are comprehensive*") (emphasis added); *see generally FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand"). As such, Congress simply made explicit in the Westfall Act what had been implicit when it adopted § 233—that federal employees do not enjoy immunity from *Bivens* actions.[23] Accordingly, the Westfall Act controls.

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[23] Petitioners and the government argue that, because the FTCA expressly preserves *Bivens* actions, but § 233 does not, this Court should not interpret § 233(a) as including a *Bivens* exception. Gonsalves Br. 35; Hui Br. 31; U.S. Br. 23. This argument fails for several reasons. First, by its terms, the FTCA's *Bivens* exception applies to *all* federal employees. Petitioners' and the government's position would require this Court to read into § 2679(b)(2)(A) an "exception" for PHS employees that conflicts with the plain terms of that provision. Second, given the comprehensiveness of the FTCA, there was simply no reason for Congress to amend § 233 to include an express *Bivens* exception. Third, given § 233(a)'s explicit reference to the FTCA, there was no reason for Congress to add a *Bivens* exception. Finally, as explained above, Congress never intended to provide *any* federal employee with immunity from constitutional torts.

III. THIS COURT'S *BIVENS* JURISPRUDENCE FURTHER CONFIRMS THAT § 233(a) DOES NOT IMMUNIZE PETITIONERS FROM LIABILITY.

This Court's *Bivens* jurisprudence—in particular, *Carlson v. Green*, 446 U.S. 14—also mandates a finding that § 233(a) does not immunize Petitioners from *Bivens* liability. As explained below, this case is functionally equivalent to *Carlson*, but factually and legally it provides an even more powerful case for rejecting Petitioners' claim of immunity.

A. This Case Is Functionally Equivalent To *Carlson*, But With A More Compelling Factual and Legal Basis.

Carlson upheld the availability of a *Bivens* remedy against BOP and PHS medical personnel who were deliberately indifferent to a federal prisoner's serious medical needs.[24] As in this case, the federal employees' deliberate indifference caused a man to die, and this Court found the FTCA inadequate to remedy the constitutional violation at issue: cruel and unusual punishment resulting in the deprivation of life.

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[24] *See* Resp. App. 69a, 74a (Compl., *Carlson v. Green*, 446 U.S. 14 (1980) (No. 78-1261), listing Assistant Surgeon General Robert T. Brutsche as a defendant and noting that he is a PHS employee).

In *Carlson*, the Court held that it was "crystal clear" that "Congress views FTCA and *Bivens* as parallel, complementary causes of action." 446 U.S. at 20. In so holding, the Court concluded that Congress did not view the FTCA as providing "an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-19 (emphasis in original). *Carlson* further found that the FTCA did not preclude *Bivens* actions because "no special factors counsell[ed] hesitation" against permitting a deliberate indifference claim against officials that included a PHS employee. *Id.* at 19.

This case provides an even more powerful basis than *Carlson* for rejecting Petitioners' bid for immunity from *Bivens*. Like *Carlson*, this is a wrongful death and survival action based on the deliberate indifference of prison medical personnel and officials. But this case is more factually compelling than *Carlson*. There, the decedent's treatment for an asthma attack was delayed for eight hours, then he was given contra-indicated medication and died soon afterwards. 446 U.S. at 16 n.1. Castaneda, in contrast, was denied treatment for *eleven months* while blood and pus oozed from fungating lesions on his penis. J.A. 60-62, 172, 184. In order to avoid a trial on the merits of these claims, the government has already admitted causing Castaneda's penile amputation and death; the only remaining liability issue is whether the individual federal officers were deliberately indifferent in doing so. The district court

found that the Plaintiffs have "already produced [evidence] . . . more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions." Pet. App. 75a.

This case also has a much stronger legal basis than *Carlson* because, eight years after *Carlson*, Congress passed the Westfall Act, clarifying that the FTCA's "exclusive remedy" extends only to common-law torts and does not preclude *Bivens* actions. 28 U.S.C. § 2679(b). This express *Bivens* exception demonstrates that Congress does not view the FTCA as an adequate substitute for *Bivens*. So here, unlike in *Carlson*, this Court need not strive to infer whether Congress intended to preserve *Bivens* claims—the Westfall Act answers the question with resounding certainty.

Petitioners attempt to distinguish *Carlson* by arguing that Respondents' *Bivens* claims are against a new category of defendants, Hui Br. 20, and that *Carlson* did not involve § 233(a) immunity, Gonsalves Br. 53.[25] In so arguing, Petitioners fail to recognize that one of the *Carlson* defendants was a PHS officer: the Assistant Surgeon General of the United States. Moreover, when evaluating immunity, "this Court has

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[25] Contrary to Petitioner Hui's contention, Castaneda's status as a civil ICE detainee is immaterial because civil detainees' constitutional rights are at least as great as convicts'. *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244-45 (1983) (noting that the due process rights of a civil detainee are at least as great as the Eighth Amendment protections for a convicted prisoner).

long favored a 'functional' inquiry—immunity attaches to particular official functions, not to particular offices." *Westfall*, 484 U.S. at 296 n.3. *Carlson* and this case involve claims against officials performing the same function: providing medical care to detainees. There is no principled basis for distinguishing among medical personnel employed by the BOP, PHS, DIHS, or any other federal agency.[26] As for Petitioners' claim that *Carlson* is irrelevant because it did not involve § 233(a) immunity, § 233(a) does not apply to *Bivens* actions and is, therefore, no more relevant here than it was in *Carlson*.

In short, Petitioners' attempts to distinguish *Carlson* are unavailing. *Carlson* is on all fours with this case, but this case provides an even more compelling basis on which to conclude that § 233(a) does not immunize petitioners from *Bivens* liablity.

B. A *Bivens* Remedy Is Essential Here For The Same Reasons The Court Articulated In *Carlson*.

Carlson's holding that the FTCA is not an effective substitute for *Bivens* is squarely applicable

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[26] To illustrate, at least one quarter of the medical personnel employed by the BOP are members of the PHS. Federal Bureau of Prisons, Central Office—Health Services Division, http://www.bop.gov/about/co/health_services.jsp (last visited Dec. 18, 2009). Therefore, BOP and PHS personnel work side-by-side every day in detention facilities throughout the country.

here. This is because the four factors identified in *Carlson* as demonstrating why a *Bivens* remedy is more effective than an FTCA remedy apply with equal or greater force in this case: (1) the FTCA is no more a deterrent today than it was when this Court decided *Carlson*, as FTCA damages remain recoverable only against the United States; (2) punitive damages remain unavailable under the FTCA, 28 U.S.C. § 2674; (3) the FTCA still does not provide a jury trial, 28 U.S.C. § 2402; and (4) the FTCA remedy continues to depend on the "law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1).

Indeed, this case illustrates why deterrence and a uniform remedy, in particular, are at least as important as they were thirty years ago. Since *Carlson*, this Court has continued to confirm the importance of individual deterrence. *Meyer*, 510 U.S. at 485 (refusing to extend *Bivens* claims to federal agencies because "the deterrent effects of the *Bivens* remedy would be lost"); *Corr. Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (refusing to extend *Bivens* to private entities because it would not advance *Bivens*' core purpose of deterring individual officers from engaging in unconstitutional wrongdoing).[27] Deterrence remains essential today because

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[27] This Court's ultimate rejection of *Bivens* claims in *Malesko* and *Meyer* is inapposite here because the plaintiffs in those cases attempted to extend *Bivens* to a new set of defendants—a private entity and federal agency. As explained above, Respondents here seek no such extension and instead have raised *Bivens* claims cognizable under *Carlson*.

federal medical personnel have the unique ability to impose a death sentence, without judge or jury, by purposefully failing to treat a life-threatening disease, as Petitioners did here. Protecting physicians from ordinary malpractice claims is a reasonable, practical endeavor. "Protecting individuals who intentionally inflict cruel and unusual punishment just because they happen to work for the Public Health Service is not." Pet. App. 72a n.13. This case presents the quintessential example of conduct that the *Bivens* remedy was intended to deter.[28]

Similarly, this case illustrates the continued importance of a uniform federal remedy for constitutional violations resulting in death. Under the FTCA, the Castaneda family's remedies are constrained by state law. California law prohibits survivors from recovering pre-death pain and suffering damages and caps non-economic damages at $250,000 for wrongful death. Cal. Civ. Code § 377.34 (2004); Cal. Civ. Code § 3333.2 (1997) ("MICRA"). Under *Bivens*, in contrast, damages are not capped and the federal survival rule allows for pre-death pain and suffering. 446 U.S. at 24-25 (noting that the liability of federal agents for constitutional claims should not depend on where the

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[28] The government argues that adverse personnel action can be an effective deterrent. U.S. Br. 18. However, despite Hui's mistreatment of Castaneda and others, *see, e.g.*, *Hernandez-Banderas v. Hui*, No. CV-08-06594 (C.D. Cal. filed Oct. 7, 2008), she continues to work for the government, treating our country's veterans at a VA Hospital. SER 351.

violation occurred); *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1190 (7th Cir. 1985) (holding that the federal survival rule applies to civil rights claims and permits pre-death pain and suffering).

The facts of this case vividly illustrate why $250,000 is a woefully inadequate remedy. As this Court noted in *Estelle*: "in the worst cases [a failure to provide medical care] may actually produce physical torture or lingering death." 429 U.S. at 103. "Physical torture" and "lingering death" is exactly what Castaneda endured. He suffered in agony for eleven months, while blood and pus oozed from fungating lesions on his penis. Anxiety over his condition and lack of treatment prevented him from sleeping without medication. According to the district court, the care afforded Castaneda "can be characterized by one word: nothing." Pet. App. 75a. After Castaneda was released from ICE custody, his penis was amputated, and he died slowly over the next year. It is doubtful that few—if any—prisoners in our nation's history endured a more torturous and lingering death at the hands of a government medical provider. Even more than in *Carlson*, the FTCA is an inadequate substitute for a *Bivens* remedy here.[29]

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[29] Petitioners rely on *Perry v. Shaw*, 106 Cal. Rptr. 2d 70 (Cal. Ct. App. 2001), to argue that Respondents may avoid the MICRA cap. Gonsalves Br. 56 n.17. That reliance is misplaced, as *Perry* involved battery for unauthorized breast augmentation surgery, and Respondents have not asserted a battery claim.

C. Petitioners Cannot Satisfy *Carlson*'s Two-Pronged "Explicit Declaration" Test For *Bivens* Preemption.

Petitioners also cannot satisfy *Carlson*'s "explicit declaration" test for *Bivens* immunity. *Carlson* held that one of the two ways in which a federal defendant may defeat a *Bivens* action is by "show[ing] that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18-19 (emphasis in original). Neither prong could possibly be satisfied here.[30]

First, Congress explicitly preserved *Bivens* actions in § 2679(b)(2), which is dispositive. Moreover, as explained above, § 233 is not an "explicit declaration" precluding *Bivens* actions because it does not even bar all suits alleging *common-law* torts, much less suits alleging constitutional torts. Even if this Court determines that § 233(a) is ambiguous based on the overall structure of § 233, it cannot bar Respondents' *Bivens* claims because an ambiguous declaration is not an "explicit" one.

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[30] Petitioner Gonsalves characterizes this test as "stray dictum." Gonsalves Br. 44, 48. However, Petitioners' entire argument is based on the "explicit declaration" prong of this "dictum." Regardless of whether the test was "dictum" in *Carlson*, this Court acknowledged that it "became holding" in 1983. *See United States v. Stanley*, 483 U.S. 699, 678-79 (1987). Most recently, in *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007), this Court cited the language of *Bivens* and *Carlson* requiring that Congress view the alternative remedy as "equally effective."

Second, Petitioners cannot demonstrate that Congress viewed the FTCA and *Bivens* remedies as "equally effective" because: (1) Congress never even *considered* whether the FTCA and *Bivens* were equally effective remedies when enacting § 233; (2) the FTCA is not, for the reasons discussed above, an equally effective substitute; and (3) Congress confirmed *Carlson*'s holding that the two remedies are not "equally effective" when it amended the FTCA (and, by incorporation, § 233) to preserve *Bivens* actions explicitly. Considering that *Bivens* (1971), *Estelle* (1976), and *Carlson* (1980) had not been decided when Congress enacted § 233 in 1970, Congress could not have viewed the FTCA and *Bivens* as providing "equally effective" remedies for deliberate indifference to a serious medical need. When Congress did consider this issue for the first time in 1988, however, it made its views clear by explicitly preserving *Bivens* actions.[31]

Petitioners' claim that dicta in *Carlson* describes § 233(a) as a "paragon of a statute that forecloses *Bivens* relief" is without merit. Gonsalves Br. 45-46. *Carlson* cites § 233(a) as an example of an "explicit

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[31] *Carlson* stated that post-*Bivens* congressional action is relevant to determine whether a pre-*Bivens* statute satisfies the "explicit declaration" test. 446 U.S. at 19-20 (Congress's 1974 amendments to the FTCA, waiving sovereign immunity for certain intentional torts, "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action"); *id.* (noting that "congressional decision[s] should be given effect by the courts").

declaration" revealing Congress's view that the FTCA is the exclusive remedy for "malpractice," not constitutional violations. 446 U.S. at 20. Moreover, as explained above, Petitioners' argument is belied by the fact that one of the principal defendants in *Carlson* was a PHS officer: the Assistant Surgeon General. If the Court truly thought § 233(a) barred *Bivens* actions, it would not have qualified its description of § 233(a) as providing immunity from "malpractice actions," nor would it have permitted a *Bivens* claim against the Assistant Surgeon General.

In short, Petitioners cannot satisfy *Carlson*'s "explicit declaration-equally effective" test.

D. Petitioners Cannot Satisfy *Carlson*'s "Special Factors" Test Because Congress Has Taken "Affirmative Action" To Preserve a *Bivens* Remedy And, In Any Event, No "Special Factors" Apply Here.

Nor can Petitioners evade *Bivens* liability by showing "special factors counselling hesitation in the absence of affirmative action from Congress." *Carlson*, 446 at 18 (citations omitted).

As a threshold matter, the "special factors" test is inapplicable where, as here, Congress *has* taken "affirmative action" by explicitly preserving *Bivens* actions in the remedial scheme claimed to be a "substitute" for a *Bivens* remedy. Given that Congress took "affirmative action" in this case by explicitly

preserving Bivens remedies in the FTCA itself, the "special factors" test does not apply. Entertaining Petitioners' "special factors" arguments here would require this Court not only to disregard Congress's unambiguous command in the FTCA, but would overrule *Carlson*'s holding that no "special factors" counsel against the recognition of a *Bivens* remedy in a custodial case involving federal officials' deliberate indifference.

Regardless, Petitioners' and their *amici*'s various "special factors" arguments fail on their own terms. First, the argument that permitting Respondents' *Bivens* claims here will open a "floodgate" of litigation is baseless. U.S. Br. 18-19; *see also* Hui Br. 44-46. The United States admits that only 75 members of the PHS currently face *Bivens* actions, U.S. Br. 2, 18-19, which accounts for less than one-half of one percent of the 20,000-member PHS workforce. This minuscule figure is unsurprising, given that only 17% of PHS commissioned officers work in a custodial setting where they could be subject to the types of *Bivens* claims asserted here. Br. in Opp. 35-36 n.19 (hereinafter "BIO").

Second, the argument that this case could somehow affect deployment of PHS personnel in times of war and national emergency is likewise unfounded. U.S. Br. 30, n.15; Commissioned Officers Ass'n ("C.O.A.") Br. 4-5, 10. Neither Petitioners nor their *amici* explain how a PHS officer could be subject

to a "deliberate indifference" claim when responding to a national emergency or during war.[32]

Finally, the argument that permitting Respondents' *Bivens* claims to proceed in this case could impact recruitment, hiring, and retention in the PHS fails on numerous levels. Gonsalves Br. 53; Hui Br. 43-45; U.S. Br. 14; C.O.A. Br. 6. As a threshold matter, Petitioners' position would create a double standard that undermines uniformity by leaving BOP personnel liable under *Bivens*, while PHS personnel who work alongside their BOP counterparts, performing functionally equivalent duties, would be immune. *See generally* BIO 33-39.[33] This result is

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[32] The United States attempts to analogize this case to the Court's decisions in *Chappell v. Wallace*, 462 U.S. 296 (1983) and *Stanley*, 483 U.S. 669. U.S. Br. 30-31 n.15. These decisions are inapposite because the *Bivens* claims here do not involve the PHS deployed in war or emergency. Should that context arise in the future, this Court could then conduct a "special factors" inquiry to determine whether to extend *Bivens* to such a context. Moreover, *Chappell* and *Stanley* involved the unique disciplinary structure of the military and the *Feres* doctrine, which focuses on the status of the *plaintiff* as a member of the armed services. Neither of these factors is present here.

[33] The United States urged review of this case on the grounds that the circuit split frustrated national uniformity, "cause[d] significant administrative problems," and hindered recruiting efforts. U.S. *Amicus* Br. in Support of Cert. 9. However, the United States offers no explanation for why a rule immunizing PHS—but not BOP—personnel would not cause administrative and recruitment difficulties in the BOP and other agencies, or how its position promotes national uniformity across government agencies.

untenable, and clearly not what Congress intended when it sought to extend the same scope of immunity to *all* federal employees in the Westfall Act.

Moreover, the notion that *Bivens* claims will somehow impair recruitment and retention because of the burdens of litigation and the "threat of ruinous liability" is more theoretical than actual. U.S. Br. 18; C.O.A. Br. 7. For one, the government defends all claims against the PHS, *see* § 233(b), and "virtually without exception" provides indemnification.[34] BIO 37. Additionally, the defense of qualified immunity means that the PHS will have protections from individual discovery. *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982). However, where, as here, constitutional and common-law torts are brought together, the employee will have to provide a deposition and testify in the FTCA action in any event.

The related argument that "allegations of government misconduct are 'easy to allege and hard to disprove,'" U.S. Br. 18, does not hold true with respect to medical claims. *See, e.g.*, Richard Shandell

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[34] The C.O.A. incorrectly asserts that liability insurance for *Bivens* claims "would necessarily be more expensive than 'standard coverage.'" C.O.A. Br. 7. For $270.00 per year, Federal Employee Defense Services ("FEDS") will provide $1,000,000 in insurance coverage for *Bivens* claims. *See, e.g.*, Fed. Employee Def. Services, Member Benefits, http://www.fedsprotection.com/services.asp?page=2 (last visited Jan. 8, 2010). Congress's stated reason for enacting § 233(a) (unaffordable malpractice premiums) plainly does not apply to *Bivens* insurance, which is affordable.

and Patricia Smith, *The Preparation and Trial of Medical Malpractice Cases* § 2.03 (2007 ed.) ("A jury will usually believe a physician over a plaintiff, unless there is a record to the contrary. Beware the case which relies on the client's word and not on medical records."). This fact becomes even more pronounced when the plaintiff is a detainee and the defendant a government doctor.

The well-defined way in which medical cases must be proven distinguishes this case from *Wilkie*, where the plaintiff suffered "death by a thousand cuts." 551 U.S. at 555. The *Wilkie* Court declined to extend *Bivens* to a property rights retaliation claim because of difficulty in defining the cause of action and the attendant invitation to bring "claims in every sphere of legitimate governmental action affecting property interests." *Id.* at 561. However, this Court qualified its holding by noting that "there is a world of difference between [death by a thousand cuts] and a popular *Bivens* remedy for a well-defined violation." *Id.* This case, unlike *Wilkie*, presents a well-defined cause of action within the heartland of cognizable *Bivens* actions.

Petitioners' reliance on *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), is similarly misplaced. Gonsalves Br. 46-47; Hui Br. 13, 35, 47. In *Bush*, 462 U.S. at 388-39, this Court held that the comprehensive remedial scheme there could substitute for *Bivens* because it adequately addressed the constitutional deprivations that arose out of an adverse employment action,

primarily by providing retroactive seniority, reinstatement, and back pay. In *Chilicky*, the Court found that the complex remedial scheme to redress denial of social security disability benefits was "more elaborate than the civil service system" in *Bush*. 487 U.S. at 425.

Bush and *Chilicky* are inapposite here because, first, the alternative remedial schemes in those cases contained no express right to bring a *Bivens* action, as the FTCA does in this case. More important, however, the constitutional violation at issue here is the deprivation of *human life*—not a property or employment interest—which makes this case unlike any other the Court has considered since *Carlson*. There is no adequate alternative to *Bivens* that could remedy a constitutional violation of this nature. Restoration of benefits, back pay, seniority, or reinstatement will do nothing to compensate the Castaneda estate for the horrific suffering that Castaneda endured or to compensate Vanessa Castaneda for the loss of her father. Here, it is damages or nothing for the Castaneda family.

Like *Carlson*, the force of this case and the need for a *Bivens* remedy derives from the severity of the constitutional violation. Recognizing the gravity of this deprivation, the district court found that the Petitioners' actions were "beyond cruel and unusual":

> Plaintiff has submitted powerful evidence that Defendants knew Castaneda needed a biopsy to rule out cancer, falsely stated that

> his doctors called the biopsy "elective," and let him suffer in extreme pain for almost one year while telling him to be "patient" and treating him with Ibuprofen, antihistamines, and extra pairs of boxer shorts. . . . Everyone knows that if you deny someone the opportunity for an early diagnosis and treatment, you may be – literally – killing the person. Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker "cruel" is inadequate.

Pet. App. 80a n.16. Given the abject cruelty of Petitioners' conduct—conduct that, in the district court's words, "transcend[ed] negligence by miles"—it is hard to overstate the importance of a *Bivens* remedy in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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10 U.S.C. § 1089

§ 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case

so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f)(1) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term "head of the agency concerned" means –

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Armed Forces Retirement Home Board, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

28 U.S.C. § 1346

§ 1346. United States as defendant

* * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * *

United States Code, Title 28, Chapter 171
Tort Claims Procedure

28 U.S.C. § 2671

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National

Guard as defined in section 101(3) of title 32, means acting in line of duty.

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28 U.S.C. § 2672

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against

the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and

conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

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28 U.S.C. § 2673

§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

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28 U.S.C. § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or

compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

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28 U.S.C. § 2675

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of

any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. § 2676

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

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28 U.S.C. § 2677

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

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28 U.S.C. § 2678

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this

section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

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28 U.S.C. § 2679

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a

United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served

upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if –

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

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28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer

of customs or excise or any other law enforcement officer, if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law. [FN1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

38 U.S.C. § 7316

§ 7316. Malpractice and negligence suits: defense by United States

(a)(1) The remedy –

(A) against the United States provided by sections 1346(b) and 2672 of title 28, or

(B) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under section 1346(b) or 2672 of title 28,

for damages for personal injury, including death, allegedly arising from malpractice or negligence of a health care employee of the Administration in furnishing health care or treatment while in the exercise of that employee's duties in or for the Administration shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim.

(2) For purposes of paragraph (1), the term "health care employee of the Administration" means a physician, dentist, podiatrist, chiropractor, optometrist, nurse, physician assistant, expanded-function dental auxiliary, pharmacist, or paramedical (such as medical and dental technicians, nursing assistants, and therapists), or other supporting personnel.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) (or such person's estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Upon a certification by the Attorney General that the defendant was acting in the scope of such person's employment in or for the Administration at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. After removal the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States. Should a

United States district court determine on a hearing on a motion to remand held before a trial on the merits that the employee whose act or omission gave rise to the suit was not acting within the scope of such person's office or employment, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) The Secretary may, to the extent the Secretary considers appropriate, hold harmless or provide liability insurance for any person to whom the immunity provisions of this section apply (as described in subsection (a)), for damage for personal injury or death, or for property damage, negligently caused by such person while furnishing medical care or treatment (including the conduct of clinical studies or investigations) in the exercise of such person's duties in or for the Administration, if such person is assigned to a foreign country, detailed to State or political division thereof, or is acting under any other circumstances which would preclude the remedies of an injured third person against the United States, provided by sections 1346(b) and 2672 of title 28, for such damage or injury.

(f) The exception provided in section 2680(h) of title 28 shall not apply to any claim arising out of a negligent or wrongful act or omission of any person described in subsection (a) in furnishing medical care

or treatment (including medical care or treatment furnished in the course of a clinical study or investigation) while in the exercise of such person's duties in or for the Administration.

42 U.S.C. § 233

§ 233. Civil actions or proceedings against commissioned officers or employees

(a) Exclusiveness of remedy

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

(b) Attorney General to defend action or proceeding; delivery of process to designated official; furnishing of copies of pleading and process to United States attorney, Attorney General, and Secretary

The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of

service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Removal to United States district court; procedure; proceeding upon removal deemed a tort action against United States; hearing on motion to remand to determine availability of remedy against United States; remand to State court or dismissal

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court: Provided, That

where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

(d) Compromise or settlement of claim by Attorney General

The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28 and with the same effect.

(e) Assault or battery

For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

(f) Authority of Secretary or designee to hold harmless or provide liability insurance for assigned or detailed employees

The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the

Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to a State or political subdivision thereof or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury.

(g) Exclusivity of remedy against United States for entities deemed Public Health Service employees; coverage for services furnished to individuals other than center patients; application process; subrogation of medical malpractice claims; applicable period; entity and contractor defined

(1)(A) For purposes of this section and subject to the approval by the Secretary of an application under subparagraph (D), an entity described in paragraph (4), and any officer, governing board member, or employee of such an entity, and any contractor of such an entity who is a physician or other licensed or certified health care practitioner (subject to paragraph (5)), shall be deemed to be an employee of the Public Health Service for a calendar year that begins during a fiscal year for which a transfer was made under subsection (k)(3) of this section (subject to paragraph (3)). The remedy against the United States for an

entity described in paragraph (4) and any officer, governing board member, employee, or contractor (subject to paragraph (5)) of such an entity who is deemed to be an employee of the Public Health Service pursuant to this paragraph shall be exclusive of any other civil action or proceeding to the same extent as the remedy against the United States is exclusive pursuant to subsection (a) of this section.

(B) The deeming of any entity or officer, governing board member, employee, or contractor of the entity to be an employee of the Public Health Service for purposes of this section shall apply with respect to services provided –

(i) to all patients of the entity, and

(ii) subject to subparagraph (C), to individuals who are not patients of the entity.

(C) Subparagraph (B)(ii) applies to services provided to individuals who are not patients of an entity if the Secretary determines, after reviewing an application submitted under subparagraph (D), that the provision of the services to such individuals –

(i) benefits patients of the entity and general populations that could be served by the entity through community-wide intervention efforts within the communities served by such entity;

(ii) facilitates the provision of services to patients of the entity; or

(iii) are otherwise required under an employment contract (or similar arrangement) between the entity and an officer, governing board member, employee, or contractor of the entity.

(D) The Secretary may not under subparagraph (A) deem an entity or an officer, governing board member, employee, or contractor of the entity to be an employee of the Public Health Service for purposes of this section, and may not apply such deeming to services described in subparagraph (B)(ii), unless the entity has submitted an application for such deeming to the Secretary in such form and such manner as the Secretary shall prescribe. The application shall contain detailed information, along with supporting documentation, to verify that the entity, and the officer, governing board member, employee, or contractor of the entity, as the case may be, meets the requirements of subparagraphs (B) and (C) of this paragraph and that the entity meets the requirements of paragraphs (1) through (4) of subsection (h) of this section.

(E) The Secretary shall make a determination of whether an entity or an officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section within 30 days after the receipt of an application under subparagraph (D). The determination of the Secretary that an entity or an officer,

governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section shall apply for the period specified by the Secretary under subparagraph (A).

(F) Once the Secretary makes a determination that an entity or an officer, governing board member, employee, or contractor of an entity is deemed to be an employee of the Public Health Service for purposes of this section, the determination shall be final and binding upon the Secretary and the Attorney General and other parties to any civil action or proceeding. Except as provided in subsection (i) of this section, the Secretary and the Attorney General may not determine that the provision of services which are the subject of such a determination are not covered under this section.

(G) In the case of an entity described in paragraph (4) that has not submitted an application under subparagraph (D):

(i) The Secretary may not consider the entity in making estimates under subsection (k)(1) of this section.

(ii) This section does not affect any authority of the entity to purchase medical malpractice liability insurance coverage with Federal funds provided to the entity under section 254b, 254b, or 256a of this title.

(H) In the case of an entity described in paragraph (4) for which an application under subparagraph (D) is in effect, the entity may, through notifying the Secretary in writing, elect to terminate the applicability of this subsection to the entity. With respect to such election by the entity:

(i) The election is effective upon the expiration of the 30-day period beginning on the date on which the entity submits such notification.

(ii) Upon taking effect, the election terminates the applicability of this subsection to the entity and each officer, governing board member, employee, and contractor of the entity.

(iii) Upon the effective date for the election, clauses (i) and (ii) of subparagraph (G) apply to the entity to the same extent and in the same manner as such clauses apply to an entity that has not submitted an application under subparagraph (D).

(iv) If after making the election the entity submits an application under subparagraph (D), the election does not preclude the Secretary from approving the application and thereby restoring the applicability of this subsection to the entity and each officer, governing board member, employee, and contractor of the entity, subject to the provisions of this

subsection and the subsequent provisions of this section.

(2) If, with respect to an entity or person deemed to be an employee for purposes of paragraph (1), a cause of action is instituted against the United States pursuant to this section, any claim of the entity or person for benefits under an insurance policy with respect to medical malpractice relating to such cause of action shall be subrogated to the United States.

(3) This subsection shall apply with respect to a cause of action arising from an act or omission which occurs on or after January 1, 1993.

(4) An entity described in this paragraph is a public or non-profit private entity receiving Federal funds under section 254b of this title.

(5) For purposes of paragraph (1), an individual may be considered a contractor of an entity described in paragraph (4) only if –

(A) the individual normally performs on average at least 32½ hours of service per week for the entity for the period of the contract; or

(B) in the case of an individual who normally performs an average of less than 32½ hours of services per week for the entity for the period of the contract, the individual is a licensed or certified provider of services in the fields of family practice, general internal medicine, general pediatrics, or obstetrics and gynecology.

(h) Qualifications for designation as Public Health Service employee

The Secretary may not approve an application under subsection (g)(1)(D) of this section unless the Secretary determines that the entity –

(1) has implemented appropriate policies and procedures to reduce the risk of malpractice and the risk of lawsuits arising out of any health or health-related functions performed by the entity;

(2) has reviewed and verified the professional credentials, references, claims history, fitness, professional review organization findings, and license status of its physicians and other licensed or certified health care practitioners, and, where necessary, has obtained the permission from these individuals to gain access to this information;

(3) has no history of claims having been filed against the United States as a result of the application of this section to the entity or its officers, employees, or contractors as provided for under this section, or, if such a history exists, has fully cooperated with the Attorney General in defending against any such claims and either has taken, or will take, any necessary corrective steps to assure against such claims in the future; and

(4) will fully cooperate with the Attorney General in providing information relating to an estimate described under subsection (k) of this section.

(i) Authority of Attorney General to exclude health care professionals from coverage

(1) Notwithstanding subsection (g)(1) of this section, the Attorney General, in consultation with the Secretary, may on the record determine, after notice and opportunity for a full and fair hearing, that an individual physician or other licensed or certified health care practitioner who is an officer, employee, or contractor of an entity described in subsection (g)(4) of this section shall not be deemed to be an employee of the Public Health Service for purposes of this section, if treating such individual as such an employee would expose the Government to an unreasonably high degree of risk of loss because such individual –

(A) does not comply with the policies and procedures that the entity has implemented pursuant to subsection (h)(1) of this section;

(B) has a history of claims filed against him or her as provided for under this section that is outside the norm for licensed or certified health care practitioners within the same specialty;

(C) refused to reasonably cooperate with the Attorney General in defending against any such claim;

(D) provided false information relevant to the individual's performance of his or her duties to the Secretary, the Attorney General, or an applicant for or recipient of funds under this chapter; or

(E) was the subject of disciplinary action taken by a State medical licensing authority or a State or national professional society.

(2) A final determination by the Attorney General under this subsection that an individual physician or other licensed or certified health care professional shall not be deemed to be an employee of the Public Health Service shall be effective upon receipt by the entity employing such individual of notice of such determination, and shall apply only to acts or omissions occurring after the date such notice is received.

(j) Remedy for denial of hospital admitting privileges to certain health care providers

In the case of a health care provider who is an officer, employee, or contractor of an entity described in subsection (g)(4) of this section, section 254h(e) of this title shall apply with respect to the provider to the same extent and in the same manner as such section applies to any member of the National Health Service Corps.

(k) Estimate of annual claims by Attorney General; criteria; establishment of fund; transfer of funds to Treasury accounts

(1)(A) For each fiscal year, the Attorney General, in consultation with the Secretary, shall estimate by the beginning of the year the amount of all claims which are expected to arise under this section (together with related fees and expenses of witnesses) for which payment is expected to be made in accordance with section

1346 and chapter 171 of Title 28 from the acts or omissions, during the calendar year that begins during that fiscal year, of entities described in subsection (g)(4) of this section and of officers, employees, or contractors (subject to subsection (g)(5) of this section) of such entities.

(B) The estimate under subparagraph (A) shall take into account –

(i) the value and frequency of all claims for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions by entities described in subsection (g)(4) of this section or by officers, employees, or contractors (subject to subsection (g)(5) of this section) of such entities who are deemed to be employees of the Public Health Service under subsection (g)(1) of this section that, during the preceding 5-year period, are filed under this section or, with respect to years occurring before this subsection takes effect, are filed against persons other than the United States,

(ii) the amounts paid during that 5-year period on all claims described in clause (i), regardless of when such claims were filed, adjusted to reflect payments which would not be permitted under section 1346 and chapter 171 of Title 28, and

(iii) amounts in the fund established under paragraph (2) but unspent from prior fiscal years.

(2) Subject to appropriations, for each fiscal year, the Secretary shall establish a fund of an amount equal to the amount estimated under paragraph (1) that is attributable to entities receiving funds under each of the grant programs described in paragraph (4) of subsection (g) of this section, but not to exceed a total of $10,000,000 for each such fiscal year. Appropriations for purposes of this paragraph shall be made separate from appropriations made for purposes of sections 254b, 254b, and 256a of this title.

(3) In order for payments to be made for judgments against the United States (together with related fees and expenses of witnesses) pursuant to this section arising from the acts or omissions of entities described in subsection (g)(4) of this section and of officers, governing board member, employees, or contractors (subject to subsection (g)(5) of this section) of such entities, the total amount contained within the fund established by the Secretary under paragraph (2) for a fiscal year shall be transferred not later than the December 31 that occurs during the fiscal year to the appropriate accounts in the Treasury.

(l) Timely response to filing of action or proceeding

(1) If a civil action or proceeding is filed in a State court against any entity described in subsection (g)(4) of this section or any officer,

governing board member, employee, or any contractor of such an entity for damages described in subsection (a) of this section, the Attorney General, within 15 days after being notified of such filing, shall make an appearance in such court and advise such court as to whether the Secretary has determined under subsections (g) and (h) of this section, that such entity, officer, governing board member, employee, or contractor of the entity is deemed to be an employee of the Public Health Service for purposes of this section with respect to the actions or omissions that are the subject of such civil action or proceeding. Such advice shall be deemed to satisfy the provisions of subsection (c) of this section that the Attorney General certify that an entity, officer, governing board member, employee, or contractor of the entity was acting within the scope of their employment or responsibility.

(2) If the Attorney General fails to appear in State court within the time period prescribed under paragraph (1), upon petition of any entity or officer, governing board member, employee, or contractor of the entity named, the civil action or proceeding shall be removed to the appropriate United States district court. The civil action or proceeding shall be stayed in such court until such court conducts a hearing, and makes a determination, as to the appropriate forum or procedure for the assertion of the claim for damages described in subsection (a) of this section and issues an order consistent with such determination.

(m) Application of coverage to managed care plans

(1) An entity or officer, governing board member, employee, or contractor of an entity described in subsection (g)(1) of this section shall, for purposes of this section, be deemed to be an employee of the Public Health Service with respect to services provided to individuals who are enrollees of a managed care plan if the entity contracts with such managed care plan for the provision of services.

(2) Each managed care plan which enters into a contract with an entity described in subsection (g)(4) of this section shall deem the entity and any officer, governing board member, employee, or contractor of the entity as meeting whatever malpractice coverage requirements such plan may require of contracting providers for a calendar year if such entity or officer, governing board member, employee, or contractor of the entity has been deemed to be an employee of the Public Health Service for purposes of this section for such calendar year. Any plan which is found by the Secretary on the record, after notice and an opportunity for a full and fair hearing, to have violated this subsection shall upon such finding cease, for a period to be determined by the Secretary, to receive and to be eligible to receive any Federal funds under titles XVIII or XIX of the Social Security Act [42 U.S.C.A. § 1395 et seq. or 1396 et seq.].

(3) For purposes of this subsection, the term "managed care plan" shall mean health maintenance organizations and similar entities that

contract at-risk with payors for the provision of health services or plan enrollees and which contract with providers (such as entities described in subsection (g)(4) of this section) for the delivery of such services to plan enrollees.

(n) Report on risk exposure of covered entities

(1) Not later than one year after December 26, 1995, the Comptroller General of the United States shall submit to the Congress a report on the following:

(A) The medical malpractice liability claims experience of entities that have been deemed to be employees for purposes of this section.

(B) The risk exposure of such entities.

(C) The value of private sector risk-management services, and the value of risk-management services and procedures required as a condition of receiving a grant under section 254b, 254b, or 256a of this title.

(D) A comparison of the costs and the benefits to taxpayers of maintaining medical malpractice liability coverage for such entities pursuant to this section, taking into account –

(i) a comparison of the costs of premiums paid by such entities for private medical malpractice liability insurance with the cost of coverage pursuant to this section; and

(ii) an analysis of whether the cost of premiums for private medical malpractice liability insurance coverage is consistent with the liability claims experience of such entities.

(2) the report under paragraph (1) shall include the following:

(A) A comparison of –

(i) an estimate of the aggregate amounts that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) would have directly or indirectly paid in premiums to obtain medical malpractice liability insurance coverage if this section were not in effect; with

(ii) the aggregate amounts by which the grants received by such entities under this chapter were reduced pursuant to subsection (k)(2) of this section.

(B) A comparison of –

(i) an estimate of the amount of privately offered such insurance that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) purchased during the three-year period beginning on January 1, 1993; with

(ii) an estimate of the amount of such insurance that such entities (together with the officers, governing board members, employees, and contractors of such entities who have been deemed to be employees for purposes of this section) will purchase after December 26, 1995.

(C) An estimate of the medical malpractice liability loss history of such entities for the 10-year period preceding October 1, 1996, including but not limited to the following:

(i) Claims that have been paid and that are estimated to be paid, and legal expenses to handle such claims that have been paid and that are estimated to be paid, by the Federal Government pursuant to deeming entities as employees for purposes of this section.

(ii) Claims that have been paid and that are estimated to be paid, and legal expenses to handle such claims that have been paid and that are estimated to be paid, by private medical malpractice liability insurance.

(D) An analysis of whether the cost of premiums for private medical malpractice liability insurance coverage is consistent with the liability claims experience of entities that have been deemed as employees for purposes of this section.

(3) In preparing the report under paragraph (1), the Comptroller General of the United States

shall consult with public and private entities with expertise on the matters with which the report is concerned.

(o) Volunteer services provided by health professionals at free clinics

(1) For purposes of this section, a free clinic health professional shall in providing a qualifying health service to an individual be deemed to be an employee of the Public Health Service for a calendar year that begins during a fiscal year for which a transfer was made under paragraph (6)(D). The preceding sentence is subject to the provisions of this subsection.

(2) In providing a health service to an individual, a health care practitioner shall for purposes of this subsection be considered to be a free clinic health professional if the following conditions are met:

(A) The service is provided to the individual at a free clinic, or through offsite programs or events carried out by the free clinic.

(B) The free clinic is sponsoring the health care practitioner pursuant to paragraph (5)(C).

(C) The service is a qualifying health service (as defined in paragraph (4)).

(D) Neither the health care practitioner nor the free clinic receives any compensation for the service from the individual or from any third-party payor (including reimbursement under any insurance policy or health plan, or

under any Federal or State health benefits program). With respect to compliance with such condition:

(i) The health care practitioner may receive repayment from the free clinic for reasonable expenses incurred by the health care practitioner in the provision of the service to the individual.

(ii) The free clinic may accept voluntary donations for the provision of the service by the health care practitioner to the individual.

(E) Before the service is provided, the health care practitioner or the free clinic provides written notice to the individual of the extent to which the legal liability of the health care practitioner is limited pursuant to this subsection (or in the case of an emergency, the written notice is provided to the individual as soon after the emergency as is practicable). If the individual is a minor or is otherwise legally incompetent, the condition under this subparagraph is that the written notice be provided to a legal guardian or other person with legal responsibility for the care of the individual.

(F) At the time the service is provided, the health care practitioner is licensed or certified in accordance with applicable law regarding the provision of the service.

(3)(A) For purposes of this subsection, the term "free clinic" means a health care facility operated

by a nonprofit private entity meeting the following requirements:

(i) The entity does not, in providing health services through the facility, accept reimbursement from any third-party payor (including reimbursement under any insurance policy or health plan, or under any Federal or State health benefits program).

(ii) The entity, in providing health services through the facility, either does not impose charges on the individuals to whom the services are provided, or imposes a charge according to the ability of the individual involved to pay the charge.

(iii) The entity is licensed or certified in accordance with applicable law regarding the provision of health services.

(B) With respect to compliance with the conditions under subparagraph (A), the entity involved may accept voluntary donations for the provision of services.

(4) For purposes of this subsection, the term "qualifying health service" means any medical assistance required or authorized to be provided in the program under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], without regard to whether the medical assistance is included in the plan submitted under such program by the State in which the health care practitioner involved provides the medical

assistance. References in the preceding sentence to such program shall as applicable be considered to be references to any successor to such program.

(5) Subsection (g) of this section (other than paragraphs (3) through (5)) and subsections (h), (i), and (l) of this section apply to a health care practitioner for purposes of this subsection to the same extent and in the same manner as such subsections apply to an officer, governing board member, employee, or contractor of an entity described in subsection (g)(4) of this section, subject to paragraph (6) and subject to the following:

(A) The first sentence of paragraph (1) applies in lieu of the first sentence of subsection (g)(1)(A) of this section.

(B) This subsection may not be construed as deeming any free clinic to be an employee of the Public Health Service for purposes of this section.

(C) With respect to a free clinic, a health care practitioner is not a free clinic health professional unless the free clinic sponsors the health care practitioner. For purposes of this subsection, the free clinic shall be considered to be sponsoring the health care practitioner if –

(i) with respect to the health care practitioner, the free clinic submits to the Secretary an application meeting the

requirements of subsection (g)(1)(D) of this section; and

(ii) the Secretary, pursuant to subsection (g)(1)(E) of this section, determines that the health care practitioner is deemed to be an employee of the Public Health Service.

(D) In the case of a health care practitioner who is determined by the Secretary pursuant to subsection (g)(1)(E) of this section to be a free clinic health professional, this subsection applies to the health care practitioner (with respect to the free clinic sponsoring the health care practitioner pursuant to subparagraph (C)) for any cause of action arising from an act or omission of the health care practitioner occurring on or after the date on which the Secretary makes such determination.

(E) Subsection (g)(1)(F) of this section applies to a health care practitioner for purposes of this subsection only to the extent that, in providing health services to an individual, each of the conditions specified in paragraph (2) is met.

(6)(A) For purposes of making payments for judgments against the United States (together with related fees and expenses of witnesses) pursuant to this section arising from the acts or omissions of free clinic health professionals, there is authorized to be appropriated $10,000,000 for each fiscal year.

(B) The Secretary shall establish a fund for purposes of this subsection. Each fiscal year amounts appropriated under subparagraph (A) shall be deposited in such fund.

(C) Not later than May 1 of each fiscal year, the Attorney General, in consultation with the Secretary, shall submit to the Congress a report providing an estimate of the amount of claims (together with related fees and expenses of witnesses) that, by reason of the acts or omissions of free clinic health professionals, will be paid pursuant to this section during the calendar year that begins in the following fiscal year. Subsection (k)(1)(B) of this section applies to the estimate under the preceding sentence regarding free clinic health professionals to the same extent and in the same manner as such subsection applies to the estimate under such subsection regarding officers, governing board members, employees, and contractors of entities described in subsection (g)(4) of this section.

(D) Not later than December 31 of each fiscal year, the Secretary shall transfer from the fund under subparagraph (B) to the appropriate accounts in the Treasury an amount equal to the estimate made under subparagraph (C) for the calendar year beginning in such fiscal year, subject to the extent of amounts in the fund.

(7)(A) This subsection takes effect on the date of the enactment of the first appropriations Act that

makes an appropriation under paragraph (6)(A), except as provided in subparagraph (B)(i).

(B)(i) Effective on August 21, 1996 –

(I) the Secretary may issue regulations for carrying out this subsection, and the Secretary may accept and consider applications submitted pursuant to paragraph (5)(C); and

(II) reports under paragraph (6)(C) may be submitted to the Congress.

(ii) For the first fiscal year for which an appropriation is made under subparagraph (A) of paragraph (6), if an estimate under subparagraph (C) of such paragraph has not been made for the calendar year beginning in such fiscal year, the transfer under subparagraph (D) of such paragraph shall be made notwithstanding the lack of the estimate, and the transfer shall be made in an amount equal to the amount of such appropriation.

(p) Administration of smallpox countermeasures by health professionals

(1) In general

For purposes of this section, and subject to other provisions of this subsection, a covered person shall be deemed to be an employee of the Public Health Service with respect to liability arising out of

administration of a covered countermeasure against smallpox to an individual during the effective period of a declaration by the Secretary under paragraph (2)(A).

(2) Declaration by Secretary concerning countermeasure against smallpox

(A) Authority to issue declaration

(i) In general

The Secretary may issue a declaration, pursuant to this paragraph, concluding that an actual or potential bioterrorist incident or other actual or potential public health emergency makes advisable the administration of a covered countermeasure to a category or categories of individuals.

(ii) Covered countermeasure

The Secretary shall specify in such declaration the substance or substances that shall be considered covered countermeasures (as defined in paragraph (7)(A)) for purposes of administration to individuals during the effective period of the declaration.

(iii) Effective period

The Secretary shall specify in such declaration the beginning and ending dates of the effective period of the declaration, and may subsequently amend such declaration to shorten or extend such effective period, provided that the new closing date is after the date when the declaration is amended.

(iv) Publication

The Secretary shall promptly publish each such declaration and amendment in the Federal Register.

(B) Liability of United States only for administrations within scope of declaration

Except as provided in paragraph (5)(B)(ii), the United States shall be liable under this subsection with respect to a claim arising out of the administration of a covered countermeasure to an individual only if –

(i) the countermeasure was administered by a qualified person, for a purpose stated in paragraph (7)(A)(i), and during the effective period of a declaration by the Secretary under subparagraph (A) with respect to such countermeasure; and

(ii)(I) the individual was within a category of individuals covered by the declaration; or

(II) the qualified person administering the countermeasure had reasonable grounds to believe that such individual was within such category.

(C) Presumption of administration within scope of declaration in case of accidental vaccinia inoculation

(i) In general

If vaccinia vaccine is a covered countermeasure specified in a declaration under subparagraph (A),

and an individual to whom the vaccinia vaccine is not administered contracts vaccinia, then, under the circumstances specified in clause (ii), the individual –

(I) shall be rebuttably presumed to have contracted vaccinia from an individual to whom such vaccine was administered as provided by clauses (i) and (ii) of subparagraph (B); and

(II) shall (unless such presumption is rebutted) be deemed for purposes of this subsection to be an individual to whom a covered countermeasure was administered by a qualified person in accordance with the terms of such declaration and as described by subparagraph (B).

(ii) Circumstances in which presumption applies

The presumption and deeming stated in clause (i) shall apply if –

(I) the individual contracts vaccinia during the effective period of a declaration under subparagraph (A) or by the date 30 days after the close of such period; or

(II) the individual has resided with, or has had contact with, an individual to whom such vaccine was administered as provided by clauses (i) and (ii) of subparagraph

(B) and contracts vaccinia after such date.

(D) Acts and omissions deemed to be within scope of employment

(i) In general

In the case of a claim arising out of alleged transmission of vaccinia from an individual described in clause (ii), acts or omissions by such individual shall be deemed to have been taken within the scope of such individual's office or employment for purposes of –

(I) subsection (a) of this section; and

(II) section 1346(b) and chapter 171 of Title 28.

(ii) Individuals to whom deeming applies

An individual is described by this clause if –

(I) vaccinia vaccine was administered to such individual as provided by subparagraph (B); and

(II) such individual was within a category of individuals covered by a declaration under subparagraph (A)(i).

(3) Exhaustion; exclusivity; offset

(A) Exhaustion

(i) In general

A person may not bring a claim under this subsection unless such person has exhausted such remedies as

are available under part C of this subchapter, except that if the Secretary fails to make a final determination on a request for benefits or compensation filed in accordance with the requirements of such part within 240 days after such request was filed, the individual may seek any remedy that may be available under this section.

(ii) Tolling of statute of limitations

The time limit for filing a claim under this subsection, or for filing an action based on such claim, shall be tolled during the pendency of a request for benefits or compensation under part C of this subchapter.

(iii) Construction

This subsection shall not be construed as superseding or otherwise affecting the application of a requirement, under chapter 171 of Title 28, to exhaust administrative remedies.

(B) Exclusivity

The remedy provided by subsection (a) of this section shall be exclusive of any other civil action or proceeding for any claim or suit this subsection encompasses, except for a proceeding under part C of this subchapter.

(C) Offset

The value of all compensation and benefits provided under part C of this subchapter for an incident or series of incidents shall be offset against the amount

of an award, compromise, or settlement of money damages in a claim or suit under this subsection based on the same incident or series of incidents.

(4) Certification of action by Attorney General

Subsection (c) of this section applies to actions under this subsection, subject to the following provisions:

(A) Nature of certification

The certification by the Attorney General that is the basis for deeming an action or proceeding to be against the United States, and for removing an action or proceeding from a State court, is a certification that the action or proceeding is against a covered person and is based upon a claim alleging personal injury or death arising out of the administration of a covered countermeasure.

(B) Certification of Attorney General conclusive

The certification of the Attorney General of the facts specified in subparagraph (A) shall conclusively establish such facts for purposes of jurisdiction pursuant to this subsection.

(5) Covered person to cooperate with United States

(A) In general

A covered person shall cooperate with the United States in the processing and defense of a claim or action under this subsection based upon alleged acts or omissions of such person.

(B) Consequences of failure to cooperate

Upon the motion of the United States or any other party and upon finding that such person has failed to so cooperate –

(i) the court shall substitute such person as the party defendant in place of the United States and, upon motion, shall remand any such suit to the court in which it was instituted if it appears that the court lacks subject matter jurisdiction;

(ii) the United States shall not be liable based on the acts or omissions of such person; and

(iii) the Attorney General shall not be obligated to defend such action.

(6) Recourse against covered person in case of gross misconduct or contract violation

(A) In general

Should payment be made by the United States to any claimant bringing a claim under this subsection, either by way of administrative determination, settlement, or court judgment, the United States shall have, notwithstanding any provision of State law, the right to recover for that portion of the damages so awarded or paid, as well as interest and any costs of litigation, resulting from the failure of any covered person to carry out any obligation or responsibility assumed by such person under a contract with the United States or from any grossly negligent, reckless,

or illegal conduct or willful misconduct on the part of such person.

(B) Venue

The United States may maintain an action under this paragraph against such person in the district court of the United States in which such person resides or has its principal place of business.

(7) Definitions

As used in this subsection, terms have the following meanings:

(A) Covered countermeasure

The term "covered countermeasure" or "covered countermeasure against smallpox", means a substance that is –

(i)(I) used to prevent or treat smallpox (including the vaccinia or another vaccine); or

(II) used to control or treat the adverse effects of vaccinia inoculation or of administration of another covered countermeasure; and

(ii) specified in a declaration under paragraph (2).

(B) Covered person

The term "covered person", when used with respect to the administration of a covered countermeasure, means a person who is –

(i) a manufacturer or distributor of such countermeasure;

(ii) a health care entity under whose auspices –

(I) such countermeasure was administered;

(II) a determination was made as to whether, or under what circumstances, an individual should receive a covered countermeasure;

(III) the immediate site of administration on the body of a covered countermeasure was monitored, managed, or cared for; or

(IV) an evaluation was made of whether the administration of a countermeasure was effective;

(iii) a qualified person who administered such countermeasure;

(iv) a State, a political subdivision of a State, or an agency or official of a State or of such a political subdivision, if such State, subdivision, agency, or official has established requirements, provided policy guidance, supplied technical or scientific advice or assistance, or otherwise supervised or administered a program with respect to administration of such countermeasures;

(v) in the case of a claim arising out of alleged transmission of vaccinia from an individual –

(I) the individual who allegedly transmitted the vaccinia, if vaccinia vaccine was administered to such individual as provided by paragraph (2)(B) and such individual was within a category of individuals covered by a declaration under paragraph (2)(A)(i); or

(II) an entity that employs an individual described by clause (I) or where such individual has privileges or is otherwise authorized to provide health care;

(vi) an official, agent, or employee of a person described in clause (i), (ii), (iii), or (iv);

(vii) a contractor of, or a volunteer working for, a person described in clause (i), (ii), or (iv), if the contractor or volunteer performs a function for which a person described in clause (i), (ii), or (iv) is a covered person; or

(viii) an individual who has privileges or is otherwise authorized to provide health care under the auspices of an entity described in clause (ii) or (v)(II).

(C) Qualified person

The term "qualified person", when used with respect to the administration of a covered countermeasure, means a licensed health professional or other individual who –

(i) is authorized to administer such countermeasure under the law of the State in which the countermeasure was administered; or

(ii) is otherwise authorized by the Secretary to administer such countermeasure.

(D) Arising out of administration of a covered countermeasure

The term "arising out of administration of a covered countermeasure", when used with respect to a claim or liability, includes a claim or liability arising out of –

(i) determining whether, or under what conditions, an individual should receive a covered countermeasure;

(ii) obtaining informed consent of an individual to the administration of a covered countermeasure;

(iii) monitoring, management, or care of an immediate site of administration on the body of a covered countermeasure, or evaluation of whether the administration of the countermeasure has been effective; or

(iv) transmission of vaccinia virus by an individual to whom vaccinia vaccine was administered as provided by paragraph (2)(B).

Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 42 U.S.C. § 2679 (1982))

AN ACT

To amend title 28, entitled "Judiciary and Judicial Procedure", of the United States Code to provide for the defense of suits against Federal employees arising out of their operation of motor vehicles in the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2679 of title 28, United States Code, is amended (1) by inserting the subsection symbol "(a)" at the beginning thereof and (2) by adding immediately following such subsection (a) as hereby so designated, four new subsections as follows:

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any

such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

"(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect."

SEC. 2. The amendments made by this Act shall be deemed to be in effect six months after the enactment hereof but any rights or liabilities then existing shall not be affected.

Approved September 21, 1961.

DATE	FILINGS-PROCEEDINGS
10/27/78	Entered order GRANTING appellant's motion of 10/26/78. The time within which the appellant must file her answer to the appellee's petition for rehearing in [sic] banc is extended up to 11/7/78.
11/24/78	Entered order denying appellee's petition for rehearing.
12/1/78	Filed o&3c application for stay of mandate pending filing of petition for cert, svc.
12/7/78	Entered order granting motion of 12/1/78 and the mandate of this court is Stayed up to 1/5/79 pending the filing of a petition for writ of cert. to Supreme Court of the U.S.
[Illegible]	Filed O&3c of appellee's second application for stay of mandate pending filing of petition for certiorari; svc.
[Illegible]	Entered order Granting application for stay of mandate only to the extent that the mandate of this court be Stayed up to 2/12/79.
2/20/79	Filed notice of filing petition for cert on 2/13/79; Supreme Court No. 78-1261.
2/26/79	Filed notice of filing petition for cert. on 2/13/79; Supreme Court No. 78-1261.
6/22/79	Entered Supreme Court order dated 6/18/79, GRANTING petition for cert.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administrator of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS) and next of kin of JOSEPH JONES, JR., PLAINTIFF

vs.

NORMAN CARLSON, Director, Federal Bureau of Prisons; C. L. BENSON, Warden, Terre Haute Penitentiary; ROBERT L. BRUTSHE, M.D., Assistant Surgeon General; JOINT COMMISSION ON ACCREDITATION OF HOSPITALS; DR. BENJAMIN B. DEGARCIA, Chief Medical Officer; Medical Training Assistant WILLIAM WALTERS; Staff Officer EMMETT BARRY, DEFENDANTS

COMPLAINT

INTRODUCTION

From January 6 through August 14, 1975, four black prisoners at the Federal Prison in Terre Haute died because of medical care so inappropriate as to evidence intentional maltreatment. The fact that all four inmates who died were black is not a mere coincidence, since it is the non-white prisoners who are the last to receive what little medical attention is available and are the last to be admitted to the prison hospital.

The prisoners at Terre Haute have tried all peaceful means available to bring to the attention of

the authorities the blatant inappropriate medical care, which threatens the lives of all of them.

Despite letters of protest to prison officials and several Congressmen and a peaceful work stoppage joined by 900 prisoners, Defendants WARDEN BENSON, DIRECTOR CARLSON and their agents did nothing to change the blatant inadequate medical conditions at Terre Haute.

The instant Complaint is a classic case of medical care which is so clearly inadequate as to amount to a refusal to provide essential care, so inappropriate as to evidence intentional maltreatment causing death. Prisoners clearly do not surrender all their constitutional rights when they enter the prison gates. Decent medical care is a basic human right which must be afforded all people, whether or not imprisoned.

JURISDICTION

1. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1331(a) and under the substantive rights created by the Constitution of the United States. Plaintiff, MRS. MARIE GREEN, next of kin and administrator of the estate of her son JOSEPH JONES (a/k/a ROSCOE SIMMONS), is suing for monetary damages for the death of her son.

PARTIES

2. Plaintiff MARIE GREEN is the next of kin and administrator of the estate of her son, JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS), who died at Terre Haute Prison from willful, wanton and criminally negligent medical care of such a degree to constitute intentional maltreatment.

3. Defendant NORMAN CARLSON is the Director of the Bureau of Prisons and is responsible for the care and management of federal prisons; sued individually and in his official capacity as Director of Bureau of Prisons.

4. Defendant C. L. BENSON is the Warden of Terre Haute Prison and is responsible for the care and management of the prisoners confined in his institution; sued individually and in his official capacity as Warden.

5. Defendant ROBERT T. BRUTSHE is the Assistant Surgeon General of the United States and is responsible for monitoring the medical services at Terre Haute Prison; sued individually and in his official capacity as Assistant Surgeon General.

6. Defendant JOINT COMMISSION ON ACCREDITATION OF HOSPITALS is in charge of inspecting hospital facilities and supplying them with accreditation if they meet set standards. This Commission accredited the hospital at Terre Haute Penitentiary.

7. Defendant DR. BENJAMIN B. DeGARCIA was Chief Medical Officer at the time of the death of JOSEPH JONES, JR., and was directly responsible for the functioning of the prison medical services; sued individually and in his official capacity as Chief Medical Officer.

8. Defendant WILLIAM WALTERS was a Medical Training Assistant employed at Terre Haute Prison as a doctor's aide and on duty and in charge of the medical facilities on the day of JOSEPH JONES' death; sued individually and in his capacity as a Medical Training Assistant.

9. Defendant Staff Officer EMMETT BARRY, custodial guard at Terre Haute Penitentiary and on duty in the hospital on the day of JOSEPH JONES' death; sued individually and in his official capacity as Staff Officer.

COUNT I

1. The deceased JOSEPH JONES, JR. was convicted of bank robbery under the name of ROSCOE SIMMONS in 1972 and placed in the custody of the Attorney General of the United States at the Federal Bureau of Prisons under a sentence of ten years.

2. The deceased, JOSEPH JONES, JR., had a history of asthma and was diagnosed as a chronic asthmatic upon his entry into the Federal Prison System.

3. In 1973 JOSEPH JONES, JR was given steroids for the treatment of an acute asthmatic episode, and he was treated with oral steroids intermittently over the next two years.

4. After being incarcertated [sic] in McNeil Island Penitentiary in Washington, and Leavenworth Penitentiary in Kansas, JOSEPH JONES, JR. was transferred to Terre Haute Prison in July of 1974.

5. In July of 1975, JOSEPH JONES' asthmatic condition deteriorated and he required hospitalization outside the penitentiary. For eight days he was hospitalized at St. Anthony's Hospital in Terre Haute, Indiana.

6. Upon his release from the hospital on August 6, 1975, the treating physician recommended that JONES not be sent back to Terre Haute Penitentiary, but instead that he be transferred to another climate. The doctor made two specific recommendations: Lexington, which has a good management program for chronic diseases; and Sandstone, which has a drier climate.

7. The recommendation was ignored by the Defendants and their agents. JOSEPH JONES was placed back in Terre Haute Prison, where he died eight days later.

8. On his return to the prison hospital, the deceased was not given proper medication as directed by the local hospital, nor was the treatment of steroids

continued, as ordered by the physician at the local hospital.

9. On August 14, JOSEPH JONES complained of an asthma attack and was admitted to the hospital at about 3:00 p.m. From that time on, the Defendants were responsible for a course of conduct which was willful, wanton and criminally negligent and so blatantly inappropriate as to evidence intentional maltreatment, and was directly responsible for the death of JOSEPH JONES, JR.

10. Although JONES was in serious condition for eight hours before he died, no doctor was on duty, nor was any doctor called to treat him. There was a deliberate indifference to the deceased's repeated cries for essential treatment.

11. Defendant DR. BENJAMIN DeGARCIA was not present at the prison hospital on weekends, nor did he provide a procedure to check in in case of emergencies. Defendant DeGARCIA allowed a prison hospital to function with totally inadequate staff, improperly trained, and without proper equipment and procedures.

12. Medical Training Assistant WALTERS, a non-licensed nurse, was left in charge of the hospital. Although JONES was becoming more agitated and having more and more difficulty breathing, WALTERS left JONES alone with inmate nurses while he went around to the floors dispensing medications.

13. When WALTERS returned, he brought the respirator with him. WALTERS had been put on notice two weeks prior that the respirator was broken, yet he still tried to go through the motions of administering the respirator. JONES pulled away from WALTERS, telling him that the respirator was making his breathing worse, and in fact the respirator was not functioning properly.

14. WALTERS then administered two shots of Thorazine (intervenously and intermuscularly) to JONES, who was having great difficulty breathing. The use of Thorazine is directly contradictory to the treatment necessary for someone suffering from an asthma attack.

15. About one-half hour after the second shot of Thorazine was administered, JOSEPH JONES had a respiratory arrest. Defendant Staff Officer BARRY and Medical Training Assistant WALTERS brought an emergency cart to administer an electric jolt to the deceased, but neither WALTERS nor BARRY knew how to operate this machine. JONES was pronounced dead at St. Francis Hospital in Terre Haute.

16. The death of inmate JONES was the fourth inmate death at Terre Haute resulting from inadequate medical care in a seven-month period.

17. Defendants CARLSON, BENSON and BRUTSCHE [sic] were all put on notice prior to the instant case that the medical treatment and facilities in the Terre Haute prison hospital were grossly inadequate. Letters were written to Director CARLSON

and Warden BENSON complaining of the lack of proper medical care. In addition, prisoners at Terre Haute staged a work stoppage and peaceful protest to bring the serious problem of inadequate medical care to the attention of the prison authorities.

18. Despite the repeated requests for basic changes in the procedures, facilities and personnel at the Terre Haute prison hospital, Defendants CARLSON, BENSON and BRUTSHE did nothing to adequately alter the grossly inadequate medical care being administered at Terre Haute. They ignored the requests for change despite three prior inmate deaths and allowed the prison hospital to operate in a manner which perpetuated grossly inappropriate medical care.

19. Defendant Assistant Surgeon General ROBERT L. BRUTSHE is employed by the United States Public Health Service and visited Terre Haute twice in the last year to review specific cases, as well as to inspect the total medical program at Terre Haute. He gave the medical facilities his approval and failed to recommend needed changes in equipment, procedures and availability of trained medical staff.

20. THE JOINT COMMISSION ON ACCREDITATION OF HOSPITALS gave accreditation to the prison hospital despite its serious deficiencies in equipment, procedures, and availability of doctors and trained medical staff.

21. The above alleged acts of the Defendants and their agents, coupled with the complete failure of the Defendants to provide any positive medical treatment for JOSEPH JONES, JR., constitutes a course of medical care so clearly inadequate as to amount to the refusal to provide essential care. Such acts were so blatantly inappropriate as to evidence intentional maltreatment resulting in the deprivation of JOSEPH JONES, JR.'s life, in violation of the due process clause of the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages, plus costs of this action, including attorneys fees; and such other relief as this Court deems just, proper and equitable.

COUNT II

22-42. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 22 through 43 [sic] of this Count II, as if fully set forth herein.

43. The above alleged acts of the Defendants and their agents and the complete failure to provide any positive medical treatment for JOSEPH JONES, JR., as he suffered from a severe asthma attack which resulted in the loss of his life, constituted cruel and unusual punishment, violative of the Eigth [sic] Amendment to the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages, plus the costs of this action, plus such other relief as this Court deems just and proper.

COUNT III

44-64. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 44 through 64 of this Count III, as if fully set forth herein.

65. The above alleged acts of Defendants and the absolute failure to provide a positive course of essential medical treatment was caused in part by the fact that the deceased was black, and he was denied basic humane medical treatment, which resulted in his death, on the basis of race, in violation of the equal protection component of the Fifth Amendment of the United States Constitution.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for $500,000 in actual damages plus the costs of this action, including attorneys fees, and such other relief as this Court deems just and proper.

COUNT IV

66-86. Plaintiff hereby realleges and incorporates paragraphs 1 through 21 of Count I as paragraphs 66 through 86 of this Count IV, as if fully set forth herein.

87. The above alleged actions of the Defendants were of a malicious and intentional nature and manifest a deliberate indifference of requests for essential treatment.

WHEREFORE, Plaintiff demands judgment against the Defendants jointly and severally, for $500,000 in punitive damages, plus costs and any relief which this Court deems appropriate.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL FOUR COUNTS.

Respectfully submitted,

/s/ _____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 76-93-C

MRS. MARIE GREEN, Administratrix of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS) and next of kin of JOSEPH JONES, JR., PLAINTIFF

– vs. –

NORMAN CARLSON, Director, Federal Bureau of Prisons, ET AL., DEFENDANTS

ANSWER TO REQUEST FOR PRODUCTION

Plaintiff, Mrs. Marie Green, by her attorneys, answers the request of the Defendant, Joint Commission on Accreditation of Hospitals, for the production of documents, by the production of the attached documents, to wit:

1. A copy of the Petition for Letters of Administration filed in the Circuit Court of Cook County, Illinois, in the Estate of Joseph A. Jones, Jr., Deceased, No. 76 P 3693.

2. A copy of the Order Appointing Legal Representative Of Decedent's Estate entered by the Court in the above mentioned matter.

3. A copy of the Letters of Administration issued in the above mentioned matter.

/s/ Charles Hoffman
CHARLES HOFFMAN
One of the Attorneys
for Plaintiff

REPLY BRIEF

No. 08-1529

In The
Supreme Court of the United States

ESTHER HUI, ET AL.,

Petitioners,

v.

YANIRA CASTANEDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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1. RESPONDENTS' ATTEMPT TO SUBORDINATE SECTION 233 TO THE FTCA IS BASED ON A MISREADING OF BOTH

The core argument presented by respondents is that the reference in 42 U.S.C. § 233(a) to sections 1346(b) and 2672 of Title 28 of the United States Code effectively subordinates section 233 to the Federal Tort Claims Act (FTCA). Resp. Br. 22-23. Respondents contend that, because the FTCA "expressly preserved a *Bivens* remedy," then so too must section 233(a). Resp. Br. 23. The fundamental problem with respondents' argument is that it ignores the actual language of the statute.

Section 233(a) provides that "[t]he remedy *against the United States* provided by sections 1346(b) and 2672 of title 28 . . . shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the [Public Health Service (PHS)] officer or employee (or his estate) whose act or omission gave rise to the claim." (emphasis added). Respondents want – and in fact need – to have the statute interpreted as if it reads that "[t]he remedy *against the PHS officer or employee* provided by sections 1346(b) and 2672 of title 28 . . . shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the [PHS] officer or employee (or his estate) whose act or omission gave rise to the claim." If the statute were indeed written in that manner, respondents' arguments might have merit, as the statute would be explicitly adopting the FTCA as the means for pursuing claims directly against PHS officials.

But that is not what the statute says or does. Rather, section 233(a) provides that no action can be pursued directly against individual PHS officers or employees. The only remedy available "for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions . . . by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment" is a claim directly against the United States; specifically, the remedy provided by the FTCA. Section 2679(b)(1) provides a similar immunity to all federal employees. However, section 2679(b)(2) excludes *Bivens* claims from the immunity provided by subsection (b)(1).

The effect of this limitation on the immunity provided by section 2679(b)(1) is that a federal employee cannot obtain immunity from a *Bivens* action by relying on section 2679(b)(1). But that says nothing about whether the federal employee can claim immunity from a *Bivens* action under some other statute or provision of the law. And it clearly must be the case that federal employees can obtain such immunity in other ways. If that were not so, then federal judges and prosecutors – who, after all, are federal employees – would be precluded from asserting absolute judicial and prosecutorial immunity.

As noted above, the reference to the FTCA in section 233(a) relates to "[t]he remedy against the United States. . . ." Section 2679(b)(1) – and thus subsection (b)(2) as well – says nothing about the scope of the remedy available against the United States, and

therefore section 2679(b)(2), with its *Bivens* exception, has no relevance to the interpretation to be given to section 233(a).

This becomes even clearer when it is recognized that the language in section 233(a) is almost identical to that in section 2679(b)(1). Both provide that the "remedy against the United States provided by sections 1346(b) and 2672" is "exclusive of any other civil action or proceeding" "by reason of the same subject matter" against the "employee whose act or omission gave rise to the claim." Subsection (b)(2) provides that the immunity set out in subsection (b)(1) "does not extend or apply to a civil action against an employee of the Government – (A) which is brought for a violation of the Constitution of the United States." The only reason Congress would have included such a limitation on the scope of the immunity provided by subsection (b)(1) is because without such a qualification, that immunity would extend to civil actions brought against the federal employee for alleged constitutional violations. No such limitation on the scope of the identical immunity provided by section 233(a) has ever been enacted by Congress, so no such limitation exists. That means – to paraphrase respondents – that "this Court need look no further than the plain language of the statute to resolve the question presented in [petitioners'] favor." Resp. Br. 23.

2. THE VARIOUS SUBSECTIONS OF SECTION 233 DO NOT SUPPORT RESPONDENTS' INTERPRETATION OF THE STATUTE

The reliance by respondents on other subsections of section 233 is equally flawed, and those subsections actually support petitioners' analysis of the scope of the immunity provided by section 233(a).

A. Section 233(c)

Respondents argue that section 233 does not contain a "scope certification" procedure applicable "where a PHS official faces a *federal* court action" and that, as a result, personnel must seek scope certification under 28 U.S.C. § 2679(d). Resp. Br. 25-26. According to respondents, this is fatal to petitioners' interpretation of section 233(a) because section 2679(d) "is subject to the FTCA's express preservation of a *Bivens* remedy for all federal employees." Resp. Br. 27. As discussed in Section 1 above, this argument fails because the *Bivens* exception in section 2679(b)(2) cannot apply to section 233(a). Further, the argument fails because it makes incorrect legal and factual assumptions.

Respondents assume that a scope certification statement is necessary for a PHS official to obtain immunity under section 233(a) in cases filed in federal court, and thus the failure of Congress to set out in section 233 a procedure for obtaining such a certification means that it intended PHS personnel to

utilize section 2679(d) to obtain such a certification. But respondents do not offer any explanation or support for their assumption. A far simpler explanation for Congress's decision not to include a federal scope certification procedure in the statute is that no certification is needed.

Section 233(a) provides that PHS personnel are immune from suit for claims of personal injury resulting from their performance of medical or related functions while acting in the course and scope of her employment. Subsection (b) provides that "[t]he Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section." The only persons "referred to in subsection (a)" are PHS officials "acting within the scope of" her employment. Thus, if the government chooses to defend the employee, that decision confirms that the Attorney General agrees that the PHS official was acting within the scope of her employment. If no defense is provided, then the Attorney General has concluded that the PHS official was not acting within the scope of her employment. Thus, no formal certification is necessary.

The necessity for certification is different in actions filed in state court, as certification is the means by which the jurisdiction of the federal courts is invoked. Without such certification, there may be nothing on the face of the complaint that would permit the action to be removed. Thus, Congress

made the point of including a "scope certification" procedure in section 233 in regard to such cases.

This is in fact how cases involving PHS personnel filed in federal court generally are handled. In at least thirty-five of the fifty-five cases cited in footnote 3 at page 23 of Dr. Hui's opening brief, the court granted motions to dismiss or motions for summary judgment in favor of PHS employees based on section 233(a) without any certification pursuant to section 2679(d).[1] Instead, immunity was granted based on a

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[1] *Starling v. United States*, 2009 U.S. Dist. LEXIS 101275 (D.S.C. May 12, 2009); *Black v. Kendig*, 2003 U.S. Dist. LEXIS 4109 (D.D.C. Mar. 18, 2003); *Wallace v. Dawson*, 302 Fed. Appx. 52 (2d Cir. 2008); *Anderson v. Bureau of Prisons*, 176 Fed. Appx. 242, 243 (3d Cir. 2006); *Beverly v. Gluch*, 902 F.2d 1568 (6th Cir. 1990); *Starling v. Kastner*, 2009 U.S. Dist. LEXIS 89095 (E.D. Tex. 2009); *Golightly v. Kastner*, 2009 U.S. Dist. LEXIS 83390 (E.D. Tex. Aug. 5, 2009); *Luna v. Pearson*, 2009 U.S. Dist. LEXIS 49309 (S.D. Miss. June 11, 2009); *Geralds v. Patel*, 2009 U.S. Dist. LEXIS 14721 (E.D.N.Y. Feb. 20, 2009); *Anson v. Bailey*, 2009 U.S. Dist. LEXIS 12168 (W.D.N.Y. Feb. 18, 2009); *Uribe v. Outlaw*, 2009 U.S. Dist. LEXIS 9176 (E.D. Ark. Feb. 9, 2009); *Morales v. White*, 2008 U.S. Dist. LEXIS 80659 (W.D. Tenn. Oct. 10, 2008); *Stine v. Fetterhoff*, 2008 U.S. Dist. LEXIS 70863 (D. Colo. Sept. 19, 2008); *Hairston v. Gonzales*, 2008 U.S. Dist. LEXIS 52962 (E.D.N.C. July 11, 2008); *Batey v. Swanson*, 2008 U.S. Dist. LEXIS 12550 (N.D. W.Va. Feb. 19, 2008); *Lee v. Guavara*, 2007 U.S. Dist. LEXIS 71206 (D.S.C. Sept. 24, 2007); *Fourstar v. Vidrine*, 2007 U.S. Dist. LEXIS 70701 (S.D. Ind. Sept. 21, 2007); *Coley v. Sulayman*, 2007 U.S. Dist. LEXIS 57639 (D.N.J. Aug. 7, 2007); *Hodge v. United States*, 2007 U.S. Dist. LEXIS 64644 (M.D. Pa. Aug. 31, 2007); *Wallace v. Dawson*, 2007 U.S. Dist. LEXIS 6279 (N.D.N.Y Jan. 29, 2007); *Barner v. Williamson*, 2007 U.S. Dist. LEXIS 42012 (M.D. Pa. Mar. 27, 2007); *Davis v. Stine*, 2006 U.S. Dist. LEXIS 79689 (E.D. Ky.

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declaration affirming that the defendant at issue was a PHS official during the relevant time period. Certification pursuant to section 2679(d) was used in just seven of those cases.[2] Petitioner was unable to determine whether certification was used in the remaining cases.[3]

Oct. 31, 2006); *Cuco v. Fed. Med. Center-Lexington*, 2006 U.S. Dist. LEXIS 49711 (E.D. Ky. June 9, 2006); *Arrington v. Inch*, 2006 U.S. Dist. LEXIS 20 33 (M.D. Pa. Mar. 30, 2006); *Smith v. Anderson*, 2006 U.S. Dist. LEXIS 23130 (S.D. W.Va. Mar. 27, 2006); *Pimentel v. Deboo*, 411 F. Supp. 2d 118, 127 (D. Conn. 2006); *Williams v. Stepp*, 2006 U.S. Dist. LEXIS 73239 (S.D. Ill. Sept. 21, 2006); *Whooten v. Bussanich*, 2005 U.S. Dist. LEXIS 37995 (M.D. Pa. Sept. 2, 2005); *Freeman v. Inch*, 2005 U.S. Dist. LEXIS 41915 (M.D. Pa. May 16, 2005); *Lowell v. Cayuga Corr. Facility*, 2004 U.S. Dist. LEXIS 20584 (W.D.N.Y. Sept. 29, 2004); *Tillitz v. Jones*, 2004 U.S. Dist. LEXIS 19101 (D. Or. Sept. 22, 2004); *Foreman v. Fed. Corr. Inst.*, 2006 U.S. Dist. LEXIS 96187 (S.D. W.Va. Mar. 29, 2006); *Cook v. Blair*, 2003 U.S. Dist. LEXIS 27806 (E.D.N.C. Mar. 20, 2003) (aff'd 82 Fed. Appx. 790, 791 (4th Cir. 2003); *Navarrete v. Vanyur*, 110 F. Supp. 2d 605 (N.D. Ohio 2000); *Lewis v. Sawyer*, 708 F. Supp. 167, 168 (E.D. Mich. 1989).

[2] *Castaneda v. United States*, 538 F. Supp. 2d 1279 (C.D. Cal. 2008); *K.R. v. Silverman*, 2009 U.S. Dist. LEXIS 83143 (E.D.N.Y. Aug. 13, 2009); *Lyons v. United States*, 2008 U.S. Dist. LEXIS 2260 (N.D. Ohio Jan. 11, 2008); *Salley v. Ellis*, 2006 U.S. Dist. LEXIS 90898 (M.D. Ga. Dec. 14, 2006); *Baez v. Arbuckle*, 2006 U.S. Dist. LEXIS 84013 (M.D. Ga. Nov. 16, 2006); *Ekwere v. Branch*, 2005 U.S. Dist. LEXIS 30183 (D. Ariz. Nov. 28, 2005); *Brown v. McElroy*, 160 F. Supp. 2d 699 (S.D.N.Y. 2001).

[3] *Walls v. Holland*, 1999 U.S. App. LEXIS 26588; *Miles v. Daniels*, 231 Fed. Appx. 591 (9th Cir. 2007); *Zanzucchi v. Wynberg*, 1991 U.S. App. LEXIS 10952 (9th Cir. May 21, 1991); *Barbaro v. United States ex rel. Fed. Bureau of Prisons FCI Otisville*, 2006 U.S. Dist. LEXIS 79338 (S.D.N.Y. Oct. 27, 2006);

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The very fact that Congress did not include a federal scope certification procedure in section 233 confirms that this analysis is correct. Respondents argue that, when faced with a lawsuit filed in federal court, PHS officials must seek scope certification under section 2679(d). Resp. Br. 26. But section 2679(d)(1), which provides the entire basis for respondents' argument, was not enacted until 1988. In 1971, when section 233 became law, section 2679(d) did not provide for scope certification in cases initially filed in federal court; only in those cases initially filed in state court. Clearly, Congress did not enact this immunity only to make it impossible to invoke it in federal court.

Thus, nothing in the certification procedures set out in section 233(c) supports respondents' interpretation of the scope of the immunity provided by section 233(a), and the fact that certification was used in the district court in this case is meaningless because it was not required.

Butler v. Shearin, 2006 U.S. Dist. LEXIS 97961 (D. Md. Aug. 29, 2006); *Dawson v. Williams*, 2005 U.S. Dist. LEXIS 3059 (S.D.N.Y. Feb. 28, 2005); *Miles v. Daniels*, 2004 U.S. Dist. LEXIS 19400 (D. Or. Sept. 21, 2004); *Valdivia v. [Henneford]*, 2004 U.S. Dist. LEXIS 16355 (W.D.N.Y. Aug. 10, 2004); *Cuoco v. Quinlan*, 1992 U.S. Dist. LEXIS 17176 (S.D.N.Y. Nov. 12, 1992); *McMullen v. Hirschberger*, 1993 U.S. Dist. LEXIS 78 (S.D.N.Y. Jan. 7, 1993).

B. Section 233(f)

Respondents argue that "[s]ection 233(f)'s 'insure-or-indemnify' clause further confirms that § 233(a)'s exclusivity language does not bar all actions against PHS officials and, indeed, permits *Bivens* actions." Resp. Br. 28. Respondents reach this conclusion because, as they construe subsection (f), it "anticipates that, when an injured party does not have a remedy against the United States under the FTCA, he may sue a PHS official individually. The PHS official's protection in those circumstances is not immunity from suit; rather, it is indemnification or insurance, at the federal agency's discretion." Resp. Br. 29. In essence, respondents are interpreting section 233(a) to contain an implied limitation on its scope; specifically, that, if no remedy is available against the United States under the FTCA, then the individual PHS official does not have immunity. Respondents are misinterpreting the statute. The purpose of subsection (f) is not to protect PHS officials from an implied limitation on the scope of subsection (a) that respondents believe exists. The purpose of the subsection is to provide protection to PHS officials in particular cases that are outside the explicit limitations of the statute.

Contrary to respondents' assertion, petitioner has never claimed that by enacting section 233, Congress "intended to immunize PHS officers from all liability." Resp. Br. 29. The immunity created by section 233 is explicitly limited on its face. It only applies to claims made (1) "for damage for personal injury, including

death," (2) "resulting from the performance of medical, surgical, dental, or related functions," (3) "by any commissioned officer or employee of the Public Health Service," (4) "while acting within the scope of his office or employment." 42 U.S.C. § 233(a). If any one of these four elements is missing, there is no immunity. However, there is nothing in those four elements that in any way limits the immunity based on the legal theory underlying the claim, be it negligence, intentional tort, or constitutional tort.

Section 233(f) – and similar "insure or indemnify" provisions in other statutes – reflect Congress's recognition that there are situations where PHS officials should have immunity, but in which one of the four elements is unavoidably missing. Specifically, the subsection addresses two of those situations. The first is where the employee "is assigned to a foreign country." 42 U.S.C. § 233(f). An immunity provided by U.S. law is useless to a PHS official sued in a foreign court. So, to protect the official, Congress empowered the Secretary to provide insurance or indemnification for such officials. *See United States v. Smith*, 499 U.S. 160, 172 n.15 (1991) ("§ 1089(f) still serves to protect foreign-based military personnel against malpractice suits in *foreign* courts.").

The second situation is where the PHS official is "detailed to a State or political subdivision thereof or to a non-profit institution." 42 U.S.C. § 233(f). In these situations, it could be argued that the PHS official is no longer "acting within the scope of his office or employment" – since the official is not working

directly for the federal government – and thus the immunity provided by subsection (a) does not apply. But Congress determined that such officials should still be protected, since their work outside "the scope of [their] office or employment" was the result of the employee having been officially directed by the federal government to engage in this non-federal government work.

The Sixth Circuit has analyzed a statute similar to section 233 in just this way:

> The purpose of Section 1089(f) is not to create an exception to the immunity from malpractice actions created by Section 1089(a). The purpose of subsection (f) is to enhance protection against malpractice actions in circumstances where local law allows recovery against military doctors. The subsection mentions two such circumstances: when a military physician is (1) assigned to a foreign country or (2) assigned to other than a federal department, e.g. a private hospital. In such circumstances the doctor may not be covered by the Federal Tort Claims Act and the Secretary of Defense is authorized to provide indemnification or insurance. Subsection (f) is not designed to create liability in malpractice actions for federal employees.

Baker v. Barber, 673 F.2d 147, 149-150 (6th Cir. 1982) (citations omitted).

The presence of subsection (f) in section 233 thus provides no support for the contention that subsection

(a) does not immunize PHS officials against *Bivens* actions. Section 233(a) may not be all-encompassing, but so long as the claim against the PHS official meets the four foundational elements – as this case does – the immunity applies, regardless of the legal theory underlying the claim.

C. Section 233(e)

28 U.S.C. § 2680(h) prevents plaintiffs from pursuing claims under the FTCA against the United States arising out of assault or battery. But in section 233(e), Congress provided that section 2680(h) would not "apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions. . . ." Respondents argue that "§ 233(e) shows that § 233(a) does not provide PHS officials with immunity from all civil actions." Resp. Br. 34, n.18. Respondents contend that "[t]he majority of courts construing § 233 and similar statutes have held that subsection (e) provides medical personnel with immunity from assault and battery that they would not enjoy under subsection (a) alone." Resp. Br. 34, n.18 (citing, *inter alia*, *Lojuk v. Quandt*, 706 F.2d 1456, 1463 (7th Cir. 1983) ("in 10 U.S.C. § 1089, 42 U.S.C. § 233, and 42 U.S.C. § 2458a, it is the presence of subsection (e) waiving the immunity of the United States for battery under Section 2680(h) that provides immunity for individual defendants in medical treatment cases.")).

That contention is based on the same flawed conclusion that respondents offered in regard to section 233(f): the assumption that there is an implied limitation on the scope of the immunity provided by statutes such as section 233(a) if no remedy is available against the United States under the FTCA. *See Lojuk*, 706 F.2d at 1463 ("[w]ithout a comparable subsection in Section 4116, there is no official immunity from battery, because there is no alternative remedy available against the United States.") (footnote omitted).

Respondents' assumption flies in the face of the explicit language of section 233(e). The statute says nothing about expanding the immunity provided to PHS officials by subsection (a). Rather, it explicitly limits the immunity otherwise provided to the United States by 28 U.S.C. § 2680(h). Thus, the purpose of subsection (e) is not to provide additional protection to PHS officials. Rather, its purpose is to ensure that the combination of the immunity provided by section 233(a) and the immunities provided to the government by the FTCA does not result in third parties having no remedy at all.

So, as with subsection (f), there is nothing in the language of section 233(e) that supports an argument that there is an implied limitation on the immunity provided to PHS officials by section 233(a).

3. CONGRESS INTENDED SECTION 233 TO PROVIDE COMPREHENSIVE IMMUNITY TO PHS EMPLOYEES FROM *ALL* LAWSUITS, NOT JUST THOSE SOUNDING IN NEGLIGENCE

Respondents argue that the title given by Congress to section 233 – "Defense of Certain Malpractice and Negligence Suits" – indicates that it was only intended to provide immunity to actions sounding in negligence. Resp. Br. 35-36. But the reverse is actually true.

In their opening briefs, petitioners argued that the term "malpractice" encompassed more than just medical negligence. Respondents' answer was to assert that "Petitioners' reliance on *Webster's Dictionary* in support of their contention . . . is singularly unpersuasive" and that "the common law is the proper source for determining the meaning of an undefined term." Resp. Br. 37-38. But instead of citing to the common law, respondents cited to a different dictionary, one whose definition they found more to their liking. Resp. Br. 38.

Contrary to respondents' assertion, Dr. Hui did not rely on – or even cite to – a dictionary definition to support her contention that "malpractice means more than just medical negligence." Hui Br. 40. Instead, Dr. Hui cited to the common law to show that in 1970, when Congress enacted section 233, there were published cases noting that the term "malpractice" covered more than just medical negligence,

and could even encompass criminal acts. Hui Br. 39 (citing *Sommer v. New Amsterdam Casualty Co.*, 171 F. Supp. 84 (D. Mo. 1959); *Bakewell v. Kahle*, 125 Mont. 89, 93 (Mont. 1951)).

Thus, in 1970, the "customary liability insurance" that section 233(a) was intended to replace (see 116 Cong. Rec. 42,543 (1970)) could cover claims that, like deliberate indifference, went beyond garden-variety medical negligence. *See also Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968) (professional liability policy covered psychiatrist's mishandling of transference phenomenon, including sexual misconduct with patient); *Cramer v. Price*, 84 Ohio App. 255, 258, 82 N.E.2d 874 (Ohio 1948) ("malpractice . . . is defined as negligent or unlawful willful acts committed by a physician in treating his patient"); *Physicians' & Dentists' Business Bureau v. Dray*, 8 Wn.2d 38, 41, 11 P. 2d 568 (Wash. 1941) ("'Malpractice . . . comprises all acts and omissions of a physician or surgeon as such to a patient as such, which may make the physician or surgeon either civilly or criminally liable.'"). So petitioners have met the very standard proposed by respondents for showing that the term "malpractice" as used in the title of section 233 meant more than just medical negligence. When Congress decided to provide broad immunity to PHS employees for claims arising out of medical or related functions, it intended that immunity to cover allegations of misconduct that went beyond medical negligence, including conduct that could be described as deliberate indifference.

Respondents also argue that, by including the word "certain" in the statute's title, Congress "never even intended for § 233(a) to provide immunity from all types of common-law tort actions, let alone constitutional tort actions." Resp. Br. 37. Respondents' argument ignores the far simpler, and more obvious explanation. The statute did not immunize PHS personnel from *all* lawsuits. It only immunized those officials from suits arising out of medical or related functions while acting in the course and scope of their employment. Thus, by its terms, the statute only applies to "certain" lawsuits, but that limitation applies to the status of the PHS official at the time of the incident at issue, not the nature of the claim being made.

The enactment of 42 U.S.C. § 238q in 2000 makes clear that Congress has recognized that the scope of the immunity provided by section 233 is greater than mere medical negligence (immunity for which could be obtained by PHS personnel under section 2679(b)(1)). In section 238q, Congress distinguished the immunity offered by section 233 from that offered by section 2679. See Hui Br. 31-33. The primary difference in that immunity was that section 233, unlike section 2679, provides PHS personnel with immunity from *Bivens* actions.

Respondents dispute that analysis, contending that "[a] far more plausible reading of this statute is that Congress wanted to ensure that § 238q did not waive any other immunity provided by any other statute applicable to health care professionals; as

explained above, § 233 reaches a distinct set of cases that § 2679 does not. See § 233(g), (j), (m), (o), and (p)." Resp. Br. 45, n.22. Respondents' analysis ignores the actual wording of section 238q.

The relevant provision of section 238q provides that it "does not waive any protection from liability for *Federal* officers or employees under . . . section 233 of this title; or . . . sections 1346(b), 2672, and 2679 of title 28, United States Code . . . " 42 U.S.C. § 238q(c)(1)(C) (emphasis added).

Subsections (g), (j), (m), (o), and (p) of section 233 apply the immunity created by section 233(a) to certain persons who are not officers or employees of the PHS. Thus, the subsections identified by respondents do not provide "any protection from liability for *Federal* officers or employees." Congress, in mentioning in the body of section 238q the protection from liability provided by section 233 to federal officials, could not possibly have been referring to subsections (g), (j), (m), (o), and (p) of section 233.

Instead, it is far more likely that Congress was recognizing the *Bivens* immunity incorporated into section 233. This conclusion is supported by the fact that section 238q was enacted several months after the Second Circuit issued its opinion in *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000), explicitly holding that section 233(a) barred *Bivens* actions against PHS personnel. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 581 (1978) ("Congress

normally can be presumed to have had knowledge of the interpretation given to the incorporated law").

4. RESPONDENTS OFFERED NO JUSTIFICATION FOR EXPANDING *BIVENS* TO THIS NEW CLASS OF DEFENDANTS IN THIS NEW CONTEXT

Just last year, this Court explained that, "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1948 (2009) (citation omitted). Respondents have failed to show why *Bivens* liability should be expanded to cover this new context or this new class of defendants.

Respondents justify this failure by asserting that "this case is functionally equivalent to *Carlson* [*v. Green*, 446 U.S. 14 (1980)]," Resp. Br. 49, and thus, presumably, does not involve either a new context or a new category of defendants. Respondents support this assertion by pointing out that one of the defendants in *Carlson* was a PHS officer (Assistant Surgeon General Robert T. Brutshe). Resp. Br. 49, n.24. But that fact, standing alone, is meaningless because the issue simply never came up in that case. The fact that one of the defendants was a PHS officer is never mentioned in either this Court's opinion or in the underlying Court of Appeals opinion. *See Green v. Carlson*, 581 F.2d 669 (7th Cir. 1978). Nor is there

any indication in either opinion that defendant Brutshe made a claim of immunity under section 233(a). Section 233(a) is not mentioned at all in the Court of Appeal's opinion and is only mentioned in this Court's opinion as an example of Congress creating a truly exclusive remedy.[4] *Carlson*, 446 U.S. at 20.

Contrary to respondents' claim, *Carlson* is not "on all fours" with this case. Resp. Br. 52. *Carlson* permitted a *Bivens* claim to be prosecuted against "federal prison officials" (446 U.S. at 16) for alleged deliberate indifference to the medical needs of a convicted prisoner housed in a federal prison in violation of the Eighth Amendment. The present case involves an attempt to prosecute federal *medical* officials for alleged deliberate indifference in the manner in which they provided medical care to a civil detainee in an immigration holding facility in violation of the Fifth Amendment. While there may be similarities between the two cases, the class of defendants is clearly different, as is the overall context.[5]

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[4] In fact, *amicus* American Civil Liberties Union ("ACLU"), in its *amicus* brief in support of the plaintiff in *Carlson*, cited section 233 as an example of Congress's explicit declaration of an exclusive remedy. *Carlson v. Green*, 1978 U.S. Briefs 1261 at *30 (U.S. Nov. 15, 1979) ("Congress has explicitly declared, in other types of cases, that the victims of federal employees' *wrongful acts* must be remitted to the FTCA.) (emphasis added).

[5] In fact, the class of defendants in this case, PHS employees, is even further removed from that at issue in *Carlson*. Respondents attempt to meld PHS officials with BOP officials

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The mere fact that a *Bivens* action was authorized in *Carlson* is not sufficient to automatically permit a *Bivens* action here. And such an action should not be permitted in this context.

It is simply too easy to plead ordinary medical malpractice as a *Bivens* claim. In her opening brief, petitioner pointed out that, in the fifty-five cases her counsel identified in which the issue of the applicability of the section 233(a) immunity to *Bivens* claims was raised, the facts alleged in the bulk of those cases did not seem to support anything beyond a claim of ordinary medical negligence. Hui Br. 44-45.

A review of the end results of those cases confirms this observation. In at least thirty-six of those cases, the court ultimately found in favor of the defendants on the merits, finding, either through motions to dismiss or motions for summary judgment, that the defendants had not been deliberately

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and claim, without support, that the only PHS officials who could possibly be subject to *Bivens* claims are those that work in BOP or ICE facilities. Resp. Br. 59. This claim is meritless. PHS employees work in a variety of agencies, in quarantine stations and can be called into military service if necessary. U.S. Br. 2. They are thus susceptible to suit for alleged constitutional violations outside of custodial settings. *See, e.g., K.R. v. Silverman*, 2009 U.S. Dist. LEXIS 83143 (E.D.N.Y. Aug. 13, 2009) (minor public school student sought leave to amend complaint to include claims for constitutional violations against two PHS employees who were working at school through federally-funded health clinic. The magistrate judge recommended that leave to amend be denied based on section 233(a) immunity).

indifferent to the plaintiff's medical needs." In only two cases could petitioner's counsel confirm that there had been a result in favor of the plaintiff through apparent settlements. *Pimentel v. Deboo*, 411 F. Supp. 2d 118 (D. Conn. 2006); *Geralds v. Patel*, 2009 U.S. Dist. LEXIS 14721 (E.D.N.Y. Feb. 20, 2009). As to the remaining cases, ten were dismissed on procedural grounds, one is still pending, and petitioner was unable to determine the grounds on which one case was resolved.

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[v] **Courts of Appeals** (listed in reverse chronological order):

Wallace, 302 Fed. Appx. 54; *Anderson*, 176 Fed.Appx. 242; *Montoya-Ortiz*, 154 Fed. Appx. 437; *Walls*, 1999 U.S. App. LEXIS 26588; *Miles*, 231 Fed. Appx. 591; *Zanzucchi*, 1991 U.S. App. LEXIS 10952.

District Courts (listed in reverse chronological order):

Starling, 2009 U.S. Dist. LEXIS 89095; *Golightly*, 2009 U.S. Dist. LEXIS 83390; *Luna*, 2009 U.S. Dist. LEXIS 49309; *Uribe*, 2009 U.S. Dist. LEXIS 9176; *Morales*, 2008 U.S. Dist. LEXIS 80659; *Hairston*, 2008 U.S. Dist. LEXIS 52962; *Batey*, 2008 U.S. Dist. LEXIS 12550; *Lyons v. United States*, 2008 U.S. Dist. LEXIS 2260 (N.D. Ohio Jan. 11, 2008); *Lee*, 2007 U.S. Dist. LEXIS 71206; *Fourstar*, 2007 U.S. Dist. LEXIS 70701; *Coley*, 2007 U.S. Dist. LEXIS 57639; *Hodge*, 2007 U.S. Dist. LEXIS 64644; *Barner*, 2007 U.S. Dist. LEXIS 42942; *Wallace*, 2007 U.S. Dist. LEXIS 6279; *Salley*, 2006 U.S. Dist. LEXIS 90898; *Davis*, 2006 U.S. Dist. LEXIS 79689; *Butler*, 2006 U.S. Dist. LEXIS 97961; *Cuco*, 2006 U.S. Dist. LEXIS 49711; *Arrington*, 2006 U.S. Dist. LEXIS 20193; *Anderson*, 2005 U.S. Dist. LEXIS 41911; *Whooten*, 2005 U.S. Dist. LEXIS 37995; *Freeman*, 2005 U.S. Dist. LEXIS 41915; *Dawson*, 2005 U.S. Dist. LEXIS 3059; *Tillitz v. Jones*, 2004 U.S. Dist. LEXIS 19401; *Miles*, 2004 U.S. Dist. LEXIS 19400; *Valdivia*, 2004 U.S. Dist. LEXIS 16355; *Foreman*, 2006 U.S. Dist. LEXIS 96187; *Brown*, 160 F. Supp. 2d 699; Navarrete, 110 F. Supp. 2d 605; *Lewis*, 708 F. Supp. 167.

This lack of success by plaintiffs when they accuse PHS personnel of deliberate indifference undermines respondents' complaint that Dr. Hui is still working as a government doctor. Resp. Br. 54, n.28. Just because a PHS official is accused of wrongdoing does not make it so, as can be seen by the endless litigation forced on Physician's Assistant Lieutenant Commander Diane Inch, a commissioned officer in the PHS working at the Federal Correctional Institution at Allenwood, Pennsylvania. In the past six years, twelve different lawsuits have been filed by prisoners accusing her of deliberate indifference to medical needs.[7] Despite these repeated accusations of wrongdoing, in none of those twelve cases has there been a finding of deliberate indifference against Lt. Cmdr. Inch or any of the other medical personnel at the prison. In eight of the cases, the court ruled in favor of defendants on the merits, finding no deliberate indifference. Two cases were dismissed based on plaintiff's failure to exhaust

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[7] *Hodge v. United States*, 2007 U.S. Dist. LEXIS 64644 (M.D. Pa. Aug. 31, 2007); *Arrington v. Inch*, 2006 U.S. Dist. LEXIS 20193 (M.D. Pa. Mar. 30, 2006); *Freeman v. Inch*, 2005 U.S. Dist. LEXIS 41915 (M.D. Pa. May 16, 2005); *Sankey v. Federal Bureau of Prisons*, Case No. 07cv1223 (M.D. Pa.); *Gordon v. Inch*, Case No. 06cv0295 (M.D. Pa.); *McGlory v. Vermiere*, Case No. 06cv2279 (M.D. Pa.); *Spencer v. Laino*, Case No. 04cv2501 (M.D. Pa.); *Tilden v. Laino*, Case No. 03cv757 (M.D. Pa.); *Foulks v. Inch*, Case No. 04cv1305 (M.D. Pa.); *Cossey v. Inch*, Case No. 04cv1136 (M.D. Pa.); *Robinson v. USA*, Case No. 08cv932 (M.D. Pa.); *Stutley v. Potope*, Case No. 09cv2168 (M.D. Pa.)

administrative remedies. The remaining two cases currently remain active with a motion for summary judgment pending in one.

Given the repeated lawsuits filed against Lt. Cmdr. Inch, there can be no doubt that eliminating the immunity to *Bivens* actions provided by section 233(a) will lead to a flood of groundless *Bivens* claims against PHS officials.[8] This factor clearly counsels hesitation in extending *Bivens* to this new class of defendants and belies the suggestion of respondents and their *amici* that recognizing the applicability of section 233(a) immunity to *Bivens* claims will foreclose numerous meritorious claims. If one looks beyond bare allegations in a complaint or sensational exposés in newspapers, the reality is that the vast majority of the claims of deliberate indifference are utterly meritless.

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[8] Respondents attempt to show that there is no danger of a flood of *Bivens* claims by pointing out that, out of 20,000 members of PHS, only 75 currently face *Bivens* actions. Resp. Br. 59. However, the 75 defendants cited in the government's brief are from a sample set limited to PHS personnel working at DHHS or BOP facilities, of which there are only a total of 1086. The fact that 1 of every 15 PHS officials working in a custodial setting is already having to defend him or herself against what are likely groundless *Bivens* claims is the tip of the litigation iceberg that will emerge if this Court officially authorizes *Bivens* claims to be prosecuted against PHS officials.

5. THE FACTUAL PICTURE PRESENTED BY RESPONDENTS AND THEIR *AMICI* IS MISLEADING

The specific facts of this case are not material to the Question Presented because petitioners, for the purposes of the appeal of the denial of the motion to dismiss, did not dispute that respondents had alleged facts sufficient to constitute a claim for deliberate indifference. The only material issue is whether section 233(a) allows *Bivens* claims against PHS officials based on alleged deliberate indifference to serious medical needs. However, in an effort to sway the Court based on sympathy for Castaneda and enmity toward petitioners, the briefs of respondents and their *amici* rely heavily on the facts as alleged by respondents, as well as allegations made outside the pleadings in depositions, other lawsuits, and newspaper articles. Petitioner feels compelled to briefly address some of these factual contentions.

- *"Hui . . . declined an outside physician's offer to arrange for the biopsy." Resp. Br. 3 (citing J.A. 125; SER 372, 379).*

This statement is incomplete and misleading. Dr. Hui only declined Dr. Wilkinson's offer to admit Castaneda to the hospital to perform the biopsy. It was the hospital admission that Dr. Hui declined, not the biopsy. Instead, because the biopsy was an outpatient procedure and there was no authorization for an inpatient admission, the decision was made to have "Castaneda seen by a urologist first." J.A. 125, 124 ["Physicians [at SDCF] wish to pursue outpatient

biopsy"]. The fact that the May 2006 TAR did not authorize an inpatient admission was confirmed by Lt. Walker at his deposition:[9]

> Q: The May 2006 TAR that we talked about that authorized Mr. Castaneda to be seen by Dr. Wilkinson, do you remember that?
>
> A: Yes.
>
> Q: That TAR did not include approval for an in-patient admission into a hospital; correct?
>
> A: Correct.

Walker Dep. at 211-12.

Lt. Walker, who was Castaneda's "primary care provider," then contacted a urologist, Dr. Masters, who "did not stress immediate urgency" in seeing Castaneda and, in any event, was unable to see Castaneda until August 2006 because of an extended vacation. J.A. 137; Walker Dep. at 92.

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[9] Lt. Walker's deposition testimony, which was taken a month before the Ninth Circuit issued its opinion, is not appropriately before the Court. However, in its brief, *amicus* ACLU relied on the deposition testimony of Lt. Walker who, despite being primarily responsible for Castaneda's care, was not named as a defendant. ACLU Br. 4. The ACLU, like respondents, hopes to shift the focus of this case away from the clear language of section 233(a) and onto the alleged facts of the case. While petitioner disagrees with this approach, she has no choice but to cite to the same evidence to make sure the facts are not distorted.

- *"According to Hui, any medical condition where death is not immediately imminent is 'elective.'" Resp. Br. 5 (citing SER 369-70).*

This statement is misleading as it suggests Dr. Hui had her own definition of the term "elective." However, in the third amended complaint, respondents alleged that "*DIHS*'s medical definition of 'elective' is: 'any procedure that we have time to submit a TAR and allow for approval . . . in the sense that it is not an emergency that they will die now.'" J.A. 365-66 (emphasis added).

- *"Petitioners suggest that DIHS policy required Hui to arrange the biopsy on an out-patient basis. Gonsalves Br. 5; Hui Br. 5. This assertion is unsupported by the record." Resp. Br. 5, n.5.*

Respondents make this identical allegation in their third amended complaint. J.A. 367, ¶ 124 ("HUI did not authorize CASTANEDA's hospital admission for a biopsy on June 7 because she needed a specific approval for a patient to be admitted in a non-emergent situation."). It was that allegation to which petitioner cited in the opening brief.

- *"Instead, DIHS's records falsely characterized Masters as stating that the 'elective procedures this patient may need in the future are cytoscopy and circumcision.'" Resp. Br. 7 (citing J.A. 161).*

Respondents suggest that petitioners wrote the medical records they characterize as false and, using the district court's factually inaccurate order, that the medical record at page 161 of the Joint Appendix proves that petitioners "may have lied about" doctor Masters's recommendations. Resp. Br. 7, n.6. Respondents fail to mention that it was Lt. Walker, not Dr. Hui or Commander Gonsalves, who authored the medical record at issue. J.A. 161.

- *Amicus ACLU contends that Dr. Hui told Lt. Walker not to pursue an outpatient biopsy of Castaneda. ACLU Br. 6 (citing Walker Dep. 76-77).*

This contention is misleading because the ACLU failed to include testimony by Lt. Walker just one page later that directly contradicts its accusation. Relating a conversation that he had with Dr. Hui after Castaneda was seen by Dr. Wilkinson on June 7, 2006, Walker testified as follows:

> Q: Did Dr. Hui ever tell you that, "Well, we're going to try to do [the biopsy] on an outpatient basis"?
>
> A: Yes. Yes, she did.
>
> Q: What did she say about that?
>
> A: Just basically, you know, "If you're going to pursue this, do it on an outpatient. We're not going to admit him."

Walker Dep. 78-79.

Thus, Dr. Hui authorized Lt. Walker to pursue a biopsy for Castaneda on an outpatient basis. This conclusion is supported by the fact that, between June 7 and July 12, 2006, Lt. Walker called Dr. Masters' office four to six times to arrange for a biopsy for Castaneda on an outpatient basis. J.A. 137. Unfortunately, because of his vacation schedule, Dr. Masters did not have an appointment available until August. Lt. Walker then made arrangements for Castaneda to go to the emergency room in July 2006 where he was seen by a urologist who diagnosed him with genital warts. J.A. 139-40, 145. The ACLU's suggestion that Dr. Hui prevented Lt. Walker from getting a biopsy for Castaneda is spurious.

CONCLUSION

Respondents argue that adopting "Petitioners' position would create a double standard that undermines uniformity by leaving BOP personnel liable under *Bivens*, while PHS personnel who work alongside their BOP counterparts, performing functionally equivalent duties, would be immune." Resp. Br. 60-61.

The problem with this argument is that the difference in treatment between PHS personnel and other federal officials is the result of a deliberate choice by Congress, which choice was indisputably within its power to make. Even if one were to accept the contention that the immunity provided by section

233(a) does not extend to *Bivens* actions, one cannot dispute that when Congress enacted section 233 in 1970, it was rejecting the ideal of uniformity and instead providing PHS personnel with immunity that was not available to the vast majority of federal employees.

Since it is an indisputable fact that Congress, in enacting section 233, singled out PHS personnel for special protection, it is hardly unreasonable to believe that Congress intended the scope of that special protection to be all-encompassing, i.e. to apply to *all* potential lawsuits that might be brought against PHS personnel for their actions in providing medical care within the scope of their employment, whatever legal theory might underlie the claims set out in those lawsuits, including theories not yet recognized when section 233 was enacted.

The language of section 233 and all of the surrounding circumstances support the conclusion that section 233(a) precludes the prosecution of *Bivens* actions against PHS officers and employees, including the claims against petitioners in this case. Accordingly, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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REPLY BRIEF

No. 08-1529

IN THE

Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,
Petitioners,

v.

YANIRA CASTANEDA, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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REPLY BRIEF

None of Respondents' arguments succeeds in creating an implied exception to the plain and absolute immunity conferred by 42 U.S.C. § 233(a). The many versions of their Westfall Act argument suffer from the same fundamental error of mischaracterizing that statute's *Bivens* exception as an all-purpose authorization for *Bivens* claims, when it is instead a limited exception only to the specific immunity granted by the Westfall Act itself – and thus inapplicable to the separate § 233(a) immunity. Turning from the Westfall Act to § 233, Respondents ignore the controlling language of § 233(a) and instead try to imply a *Bivens* exception from other subsections of the statute through a series of inferential leaps that the statutory language cannot support. Moreover, their main contention – that § 233(a)'s immunity does not apply when there is no remedy against the United States under the Federal Tort Claims Act ("FTCA") – is irrelevant, because Respondents *do* have an FTCA remedy. Nor can Respondents find support for their implied exception in the Court's *Bivens* case law, for those cases unequivocally require enforcement, not circumvention, of Congress's judgments. Finally, the pleas of Respondents and their *amici* for a policy-based exception to § 233(a) are meritless and, more importantly, are directed to the wrong branch of government. The statute Congress enacted must be applied according to its plain terms.

I. The Westfall Act Does Not Affect the Scope of § 233(a)'s Absolute Immunity.

1. Woven through virtually every argument in Respondents' brief is the erroneous assertion that § 233(a) is limited in some way by the Westfall Act, which in Respondents' view creates an affirmative right to bring *Bivens* claims against federal employees in every context. *See* Resp. Br. 23-24, 39-48, 56, 63. But the Westfall Act itself conclusively defeats that assertion. By its own terms, the provision on which Respondents rely, Paragraph (2) of the Westfall Act, 28 U.S.C. § 2679(b)(2), does no more than create an exception to the specific immunity provided under Paragraph (1) of the same Act, *id.* § 2679(b)(1). It therefore has no effect on the scope of § 233(a) or any other separate immunity for government employees.

The text of the Westfall Act is crystal clear on this point. Specifically, Paragraph (1) provides an immunity for all federal employees by making an FTCA suit against the United States the exclusive remedy for injury or death "arising or resulting from the negligent or wrongful act or omission of any employee of the Government." *Id.* § 2679(b)(1). Paragraph (2) then carves out an exception to the grant of immunity in Paragraph (1), and *only* to that specific immunity, stating: "*Paragraph (1)* does not extend or apply to a civil action . . . which is brought for a violation of the Constitution." *Id.* § 2679(b)(2) (emphasis added). Therefore, the *Bivens* exception in Paragraph (2) does not apply to any immunity other than the immunity provided in Paragraph (1). And as this Court's decision in *United States* v.

Smith, 499 U.S. 160 (1991), confirms the Westfall Act immunity (with its *Bivens* exception) is separate and distinct from immunities provided by other statutes, such as § 233(a). *Id.* at 172 & n.13 (Westfall Act "adds" to other immunities). PHS officers and employees are entitled to *both* immunities, and an exception to one is not an exception to the other.

Petitioner's opening brief lays out this argument, *see* Gonsalves Br. 37-38, but Respondents simply ignore it. Instead, they assume their conclusion by baldly asserting that Paragraph (2) creates an overarching entitlement to bring *Bivens* actions in every context. *E.g.*, Resp. Br. 11. They even go so far as to repeatedly quote Paragraph (2) while omitting the language that limits the *Bivens* exception to the immunity created by "Paragraph (1)." Thus, in Respondents' version the Westfall Act reads as follows: "The [exclusive] remedy against the United States provided by [the FTCA] . . . does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." *Id.* at 14 (alterations in original); *id.* at 18 (same); *id.* at 22 (same). The first ellipsis in Respondents' quotation removes the dispositive limiting reference to "Paragraph (1)."

With the actual text of the Westfall Act in mind, it is readily apparent that every version of Respondents' argument based on that Act is fatally flawed. Indeed, the existence of the *express Bivens* exception to the Westfall immunity militates against

any reading of § 233(a) as *implicitly* including the same exception. Gonsalves Br. 35-36.

First, Respondents contend that § 233(a) "incorporates" by reference "the FTCA provision that expressly preserves a *Bivens* remedy." Resp. Br. 23. But, as just explained, the Westfall Act plainly does not "expressly preserve[] a *Bivens* remedy" in all circumstances: it creates only a limited exception to a particular immunity. Therefore, even if each and every word of the Westfall Act appeared *verbatim* in § 233(a), it would still have no effect on the immunity provided by § 233(a). By its terms, Paragraph (2) of that Act still limits only the Paragraph (1) immunity, not any other immunity that Congress has separately provided. *See Smith*, 499 U.S. at 172 & n.15.

Moreover, as explained in Petitioner's opening brief, the language of § 233(a) independently defeats the incorporation argument, because § 233(a) refers to the FTCA only in describing the "remedy against the United States" that is a claimant's "exclusive" means of redress. 42 U.S.C. § 233(a); *see* Gonsalves Br. 37-38; U.S. Br. 21-22. The Westfall Act immunity and its *Bivens* exception do not define the scope of any remedy against the United States. And when § 233(a) turns from describing the remedy against the United States to limning, in a separate clause, the scope of the immunity provided to PHS officers and employees, it does not cross-reference the FTCA at all. Rather, it makes that immunity categorically applicable to preclude "any other civil action or proceeding by reason of the same subject matter." 42 U.S.C. § 233(a). Respondents provide no

response to this argument, except the conclusory assertion that it is a "strained parsing of § 233(a)[]" and "lacks merit." Resp. Br. 21. As set forth in detail here and in Petitioner's opening brief, the plain language of both § 233(a) and the Westfall Act proves otherwise.

Second, Respondents argue that even if the Westfall Act is not actually incorporated into § 233(a), it nonetheless trumps § 233(a) because "Congress's express preservation of *Bivens* remedies in § 2679(b)(2) applies on its terms to all federal employees – including PHS personnel." Resp. Br. 44; *see also id.* at 39. This argument also plainly fails because the so-called "express preservation of *Bivens* remedies in § 2679(b)(2)" is an exception *only* to Paragraph (1) of the same subsection, and therefore "preserves" nothing from the scope of the categorical immunity provided by § 233(a).[1]

When the two statutes are properly understood as setting forth two separate immunities, only one of which has a *Bivens* exception, then both have independent significance. Thus, there are some situations in which PHS workers are entitled to either immunity (a state-law claim based on a medical function); some situations in which only § 233(a) applies (a *Bivens* claim based on a medical

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[1] Respondents are also wrong that the Westfall Act is more specific than § 233(a). Resp. Br. 47-48. It is in § 233(a) that Congress decided which suits should be permitted against the specific group of federal employees of which Petitioners are members. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007).

function); some situations in which only § 2679(b) applies (a state-law claim based on a non-medical function, such as negligence in building maintenance); and some situations in which neither provision applies (a claim based on actions taken outside the scope of employment).[2]

2. Since the Westfall Act itself has no effect on the § 233(a) immunity, Respondents are forced to fall back on the legislative history of that Act, asserting that it "confirms that Congress viewed § 233(a) as providing immunity for common-law tort actions only, not *Bivens* actions." Resp. Br. 41. Respondents make no attempt to explain why Congress's view in 1988 has any bearing on the interpretation of a separate statute enacted nearly two decades earlier. *See* Gonsalves Br. 39-40. In any event, they cannot point to anything in the Westfall Act's legislative history expressing the view they espouse.

Here, once again, Respondents tangle together the two separate immunities conferred by § 233(a) and the Westfall Act. As explained in Petitioner's opening brief, Congress's purpose in enacting the Westfall Act was to undo this Court's *Westfall*

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[2] Respondents claim that § 233(a) "continues to reach distinct cases" under their reading. Resp. Br. 44 – but they do not successfully identify any. They claim that *other* subsections of § 233 would continue to operate – but that is irrelevant. *See e.g.*, *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 252-53 (1992). They also suggest that § 233(a) would still have the function of providing immunity for private contractors as defined in § 233(g)-(p). Resp. Br. 45. That is incorrect, since those subsections contain their own operative immunity language. *See e.g.*, 42 U.S.C. § 233(p)(3).

decision and reinstate for all federal employees the general immunities they had previously enjoyed by judicial decision: absolute immunity from common-law claims, and qualified immunity from constitutional claims. Gonsalves Br. 40-41. The statements of various legislators to the effect that the Westfall Act would restore the pre-*Westfall* status quo as to "Federal employees" and "individual Government officials," Resp. Br. 41-42 (quoting House Rep. at 6 and 134 Cong. Rec. 29933 (daily ed. Oct. 12, 1988)), must be understood in that context. They thus have no bearing on pre-existing statutory immunities for particular federal workers set forth in § 233(a) and similar statutes.

Further, Respondents have not identified a single statement from any legislator, committee report, or witness opining on whether § 233(a) applies to *Bivens* actions. Respondents assert that "[e]ach time Congress mentioned the[] pre-Westfall Act immunity statutes, it described them as providing immunity from common-law torts only." Resp. Br. 42. But careful examination of Respondents' citations shows this assertion is unfounded. Respondents misquote or mischaracterize several of the stray statements they cite.[3] In addition, Respondents' argument

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[3] Respondents misquote a witness at the House hearings as stating that "most federally employed physicians have *only* been protected from personal liability for claims alleging medical malpractice." Resp. Br. 42-43 (emphasis added). In fact, the witness actually stated that such physicians had "*long* been protected" from such liability. *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Gov't Relations of the H. Comm. on the Judiciary*, 100th Cong. 75 (1988) (emphasis added) – which

assumes that "malpractice" is always limited to negligence, a proposition that is demonstrably wrong. *See infra* pp. 17-19.

The legislative history of the Westfall Act unequivocally states that Congress did not intend to "expand or diminish the rights established under other Federal statutes." H.R. Rep. No. 100-700, at 7 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5951. That Act plainly does not diminish the scope of the categorical immunity that § 233(a) confers.

II. Nothing in § 233 Itself or Its Historical Context Implies a *Bivens* Exception.

Aside from their erroneous "incorporation" argument, Respondents never address the actual language of § 233(a) itself, even though it is the provision at issue here. The reason is obvious: § 233(a) unambiguously immunizes PHS officers and employees from "*any* . . . civil action or proceeding" – and thus from *Bivens* claims – arising out of medical or related functions within the scope of their

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unlike only" obviously does not exclude a broader immunity. Respondents also assert that the House Report was describing pre-*Westfall* immunity statutes such as § 233(a) when it stated that "the general rule applicable to Federal employees was that they were absolutely immune from personal liability in State common law tort actions." Resp. Br. 42 (quoting H.R. Rep. No. 100-700, at 2 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5946) (quotation marks omitted). That is incorrect. The House Report was not describing statutory immunities like § 233(a) but the judge-made immunity doctrine of *Barr v. Matteo*, 360 U.S. 564 (1959), which Congress perceived to have been altered by the *Westfall* decision. *See* H.R. Rep. No. 100-700, at 2, *as reprinted in* 1988 U.S.C.C.A.N. at 5946.

employment. 42 U.S.C. § 233(a) (emphasis added). Because Respondents cannot find any basis for their would-be *Bivens* exception in § 233(a), they cast about in the other subsections of § 233 in the hope of creating some ambiguity or doubt about the mechanics of the statute's operation in particular circumstances. But none of their arguments comes close to disturbing § 233(a)'s pellucid clarity, or to depriving Petitioners of their statutory immunity.

1. Respondents first seek to limit § 233(a)'s scope by pointing to § 233(c), which provides that the Attorney General may file a certification in state court that a PHS employee was acting within the scope of his or her employment. Because § 233(c) provides for such certification only in actions commenced in state court, Respondents contend that Petitioners could obtain immunity under § 233(a) only if the Attorney General certified that they were acting within the scope of their employment pursuant to the Westfall Act, which has a certification provision (28 U.S.C. § 2679(d)) that covers both federal-court and state-court actions. Respondents therefore conclude that Petitioners are "subject to the FTCA's express preservation of a *Bivens* remedy for all federal employees." Resp. Br. 26-27.[4]

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[4] Respondents note that the U.S. Attorney cited § 2679(d) when certifying that Petitioners were acting within the scope of their employment here. But Respondents neglect to mention that the certification *also* cited § 233(a), consistent with Petitioners invoking both of their two immunities. J.A. 54 (certification that Petitioners were acting within the scope of their employment made "pursuant to the provisions of 28 U.S.C. [§]

This argument incorrectly assumes that certification is a prerequisite for immunity under § 233(a). But § 233(a) makes no reference to such a prerequisite. Instead, its immunity expressly turns on the *fact* that a PHS employee was performing medical or related functions within the scope of his or her employment. 42 U.S.C. § 233(a). A certification from the Attorney General is merely one, non-exclusive way to provide prima facie evidence of that fact. With or without any special statutory provision, ordinary rules of evidence and procedure allow the Attorney General to submit a statement certifying that the employee was acting within the scope of his employment, and the employee may, of course, submit his own evidence showing the same thing. *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 431-32 (1995) (certification by the Attorney General under Westfall Act is "the first, but not the final word").

The reason § 233(c) provides for certification in state-court actions is that in that context certification has an important procedural function: providing what may be the sole means by which the case may be removed to federal court. 42 U.S.C. § 233(c). That procedure is unnecessary in cases

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2679(d)(1) and 42 U.S.C. § 233(a)); *see* Defs.' Notice of Mot. and Mot. to Dismiss for Lack of Jurisdiction, Mem. of P. & A. in Support Thereof 1-11, *Castaneda v. United States*, No. CV 07-0721 DDP (C.D. Cal. Jan. 11, 2008), *compare* Resp. Br. 26-27 & n.11. In any event, a citation in a district court filing has no bearing on the correct interpretation of an Act of Congress.

initiated in federal court, and so the statute makes no provision for it.[5]

Respondents' contrary position would have absurd results. If there could be no § 233(a) immunity in situations where the statute does not expressly provide for certification, then § 233(a) would not have immunized *any* conduct – even garden-variety negligence – in federal courts until 1988, when the Westfall Act's express certification procedure for federal court actions was first enacted. But even Respondents must concede that § 233(a) provided immunity against *some* tort claims in federal court before there was an express federal-court certification procedure. Therefore, such a procedure is obviously unnecessary for immunity.[6]

2. Respondents' argument based on § 233(f) is equally meritless. Section 233(f) provides that the Government may, in its discretion,

> hold harmless or provide liability insurance for any officer or employee of

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[5] The Westfall Act certification provision extends to federal court as well, see 28 U.S.C. § 2679(d), but that additional procedure, while perhaps useful in providing a way to add the United States as a defendant, is not necessary, and it in no way alters the scope of the immunity under § 233(a), which does not turn on certification.

[6] In addition, Respondents' § 233(c) argument suffers from the same flawed logic that infects their other "incorporation" arguments discussed above: even if the Westfall Act were somehow incorporated into § 233(a) via the certification procedure, the Westfall Act's *Bivens* exception still applies by its express terms only to the immunity bestowed by Paragraph (1) of that Act, not § 233(a).

> the Public Health Service for damage ... negligently caused ... while acting within the scope of his office or employment and as a result of the performance of medical ... or related functions ... if such employee is assigned to a foreign country or detailed to a State or political subdivision thereof or to a non-profit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States [under the FTCA] . . . .

42 U.S.C. § 233(f).

Because this provision permits indemnification of PHS employees in a narrow swath of cases involving foreign countries or state details, Respondents appear to infer that it affirmatively authorizes suit against the employees in these circumstances. Respondents next generalize that inference into a rule that *in every case* "when an injured party does not have a remedy against the United States under the FTCA, he may sue a PHS official individually." Resp. Br. 29. Then, springing from that suspect generalization, Respondents make a further leap by arguing that there can be no immunity for *Bivens* actions because "there has never been a remedy against the United States . . . for *Bivens* actions" as such (as opposed to remedies for the same injury but based on a different cause of action). *Id.* at 31.

Even assuming *arguendo* that the first steps in Respondents' syllogism were correct, and that

§ 233(f) could be read as eliminating the immunity of PHS employees in cases where there is no FTCA remedy (which it cannot), that would not help Respondents. An FTCA remedy *is* unquestionably available here. Indeed, Respondents have sued the United States under the FTCA based on the same factual allegations they make against Petitioners, and the United States has admitted liability. J.A. 328-29. Thus, even if the availability of an FTCA remedy were a precondition for § 233(a) immunity, that precondition is amply satisfied in this case.

To reach the opposite conclusion, Respondents contend that the FTCA remedy against the United States must be *identical* to the cause of action asserted against the PHS employees. But, as demonstrated in Petitioner's opening brief, the plain language of § 233(a) conclusively refutes any requirement of identity in the causes of action involved. It expressly provides that an FTCA remedy is exclusive of "any other civil action or proceeding *by reason of the same subject matter*" against the employees as individuals. 42 U.S.C. § 233(a) (emphasis added). Respondents do not dispute that "by reason of the same subject matter" refers "to the operative facts of a lawsuit, not the theory of liability or cause of action." Gonsalves Br. 26 – indeed, they never even mention this key language. But § 233(a) thereby states in the clearest possible terms that it *is not relevant* for purposes of an immunity determination whether the FTCA claim and the claim against the PHS employees are based on the same legal theory. All that matters is that the

claims arise out of the same underlying factual occurrences.[7]

Here, Respondents have an FTCA remedy arising out of the same operative facts that undergird the claims they assert against Petitioners. That precludes a suit against Petitioners, even if immunity under § 233(a) were somehow limited to situations in which an FCTA remedy is available.

Further, the underlying premise that there is no immunity when there is no FTCA remedy is incorrect. Section 233(a)'s broad and unqualified immunity does not depend on the existence of an FTCA remedy.[8] The language of § 233(a) itself conditions the immunity on the underlying facts – that a PHS employee was performing medical or

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[7] Indeed, it is hard to conceive of any situation – including state-law medical negligence – in which a cause of action against the United States under the FTCA would be *identical* to a cause of action against PHS employees arising out of the same subject matter. FTCA liability is generally vicarious, resting on the fact of employment and *respondeat superior*, and therefore has different elements from claims directly against an employee.

[8] The Court declined to reach the analogous issue under 10 U.S.C. § 1089 in *Smith*, despite the existence of a circuit split. *See* 139 U.S. at 171-72 & nn.13-14. Indeed, Respondents embrace one side of the very split over § 1089 discussed in *Smith*. Resp. Br. 31-32. Respondents claim the United States has changed its position since *Smith*, Resp. Br. 33, but that is incorrect. At the *Smith* argument, the United States made clear that for purposes of that case it took no position on the scope of the immunity under § 1089(a). *See* Oral Arg. Tr. at *15, *United States v. Smith*, 499 U.S. 160 (1991), *available at* 1990 WL 501295.

related functions within the scope of his employment. Under those facts, the employee is immune, and the FTCA remedy is the only or "exclusive" one – even if that exclusive remedy is ultimately precluded by an FTCA exception. Indeed, the Court interpreted virtually identical "exclusive of" language in Paragraph (1) of the Westfall Act as providing immunity whether or not an FTCA claim is barred by the statutory FTCA exceptions. *See Smith*, 499 U.S. at 165-66. The contrary reading would have anomalous effects here, such as eliminating immunity for PHS workers for injury resulting from a government quarantine, *see* 28 U.S.C. § 2680(f), and allowing a plaintiff to circumvent the § 233(a) immunity simply by letting the clock run out on an FTCA claim, *see* 28 U.S.C. §§ 2401(b), 2675 (providing that FTCA claim is forfeited unless brought within six months of agency denial).

Section 233(f)'s indemnity provision, applicable to just a few factual scenarios, thus cannot support the far-reaching inferences Respondents draw from it. Section 233(f) should be read not as *limiting* protection for PHS employees by authorizing individual suits against them in the factual settings in which it applies (much less all situations in which there may not ultimately be an FTCA recovery), but as providing *extra* protection for PHS workers in particular settings where Congress feared that they might be exposed to suit despite § 233(a). An employee "assigned to a foreign country" might well be sued in a foreign court, which might well decline to apply United States law generally or § 233(a) in particular. *See Smith*, 499 U.S. at 172 n.15. And an

employee detailed to a State or a non-profit institution might not be considered to be acting within the scope of his or her federal employment within the meaning of § 233(a). Indeed, by statute PHS workers detailed to a State or non-profit "may be placed on leave without pay and paid by the State, subdivision, or institution to which they are detailed." 42 U.S.C. § 215(d); *see also* 42 C.F.R. § 22.5 (same); *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305, 308 (1931) (discussing "borrowed servant" doctrine, under which "[w]hen one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former"). Thus, in keeping with Congress's expressed purpose of protecting PHS workers so as to encourage their recruitment and retention, § 233(f) fills a potential gap by providing for indemnification in cases where the § 233(a) immunity might be disregarded.[9]

3. Lacking any purchase in the language of § 233 itself, Respondents next try to imply a *Bivens* exception from the title of the provision and the "historical context" in which it was enacted. Resp.

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[9] In a footnote, Respondents also contend that § 233(e) supports their position. Resp. Br. 54 n.18. It does not. Section 233(e) simply broadens the FTCA remedy against the United States in certain cases, but has no effect on the immunity afforded PHS employees. *See* 42 U.S.C. § 233(e) (removing "assault or battery arising out of negligence in the performance of medical . . . or related functions" from the scope of the FTCA exception in 28 U.S.C. § 2680(h)).

Br. 35-40. Of course, neither the statute's title nor its context can vary Congress's clear command. *See, e.g., Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). But even were it appropriate to consider such interpretive tools in this case, they do not aid Respondents. *See* Gonsalves Br. 29-31.

Pointing to the title ("Defense of Certain Malpractice and Negligence Suits"), Respondents argue that deliberate indifference, which involves a heightened mens rea of recklessness, is neither "malpractice" nor "negligence." As an initial matter, Respondents do not respond to Petitioner's point, Gonsalves Br. 31, that the title would not refer to *both* "malpractice" *and* "negligence" if malpractice were nothing more than negligence in a professional context, as they contend.

In support of their position, Respondents assert that the proper reading of "malpractice" in § 233(a)'s title can be derived only from *Black's Law Dictionary* or the common law. Resp. Br. 37-38. That premise is incorrect. *See, e.g., United States v. Rodgers*, 466 U.S. 475, 480-81 (1984) (adopting "most natural, nontechnical reading of the statutory language" provided by *Webster's* instead of the "narrower, more technical meanings of the term" in *Black's Law*). In any event, however, the sources favored by Respondents refute their argument.

Respondents quote the 2004 edition of *Black's Law*, which defines malpractice as "negligence or incompetence" – a definition that by no means excludes reckless actions. But more relevant to

§ 233(a), which was enacted in 1970, is the 1968 edition of *Black's Law*, which defines malpractice as:

> Any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. ... In a more specific sense, it means bad, wrong, or injudicious treatment of a patient ... resulting in injury, unnecessary suffering, or death ... and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect, or a malicious or criminal intent.

Black's Law Dictionary 1111 (rev. 4th ed. 1968); *see also* Gonsalves Br. 29 (quoting 1961 edition of *Webster's*). That definition speaks for itself. And the common law in 1970 defined malpractice in the same broad way. *See Black's Law Dictionary* 1111 (rev. 4th ed. 1968) (citing cases); *see also, e.g., Allison v. Blewett*, 348 S.W.2d 182, 184 (Tex. Civ. App. 1961) (citing *Bakewell v. Kahle*, 232 P.2d 127, 129 (Mont. 1951)); *Camposano v. Claiborn*, 196 A.2d 129, 129-30 (Conn. Cir. Ct. 1963).

Nor do Respondents succeed in finding support in federal cases – all decided in the wake of *Estelle v. Gamble*, 429 U.S. 97 (1976), and thus after § 233(a)'s enactment – about what constitutes deliberate indifference. *Estelle* itself recognized that, while a mere allegation that "a physician has been negligent ... does not state a valid claim of medical

mistreatment" violating the Constitution, "[m]edical malpractice" can "become a constitutional violation" if the physician is deliberately indifferent. *Id.* at 107. And while the courts of appeals do sometimes use "malpractice" as a shorthand for a state-law negligence claim, they are not thereby purporting to give an exclusive definition of that term, as one of the very cases on which Respondents rely explains: "[C]ertain instances of medical malpractice may rise to the level of deliberate indifference; namely, when the malpractice involves culpable recklessness . . . . Accordingly, not every instance of medical malpractice is, a priori, precluded from constituting deliberate indifference." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996), *cited in* Resp. Br. 37.[10]

Respondents fare no better in their argument based on "historical context," by which they mean the fact that *Bivens* was not decided until six months after § 233 was enacted. Resp. Br. 38-40. It simply does not matter whether Congress specifically contemplated the possibility of a constitutional tort claim again PHS officers and employees. In choosing broad immunity language covering "any" claim, Congress surely did envision that new causes of action might be created in the future – and it

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[10] Respondents also argue that the word "certain" in the statute's title "demonstrates that Congress intended to provide PHS personnel with immunity from some – but not all – malpractice and negligence suits." Resp. Br. 37. But that word indicates nothing more than that the statute covers only suits against PHS personnel performing medical or related functions within the scope of their employment, and not every kind of malpractice and negligence suit under the sun.

expressed an intent to bar them all, regardless of their nature. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 133-35 (2001), *cited in* Resp. Br. 39; *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001). If Respondents' position were accepted, Congress would have to amend a statute every time there was a relevant new development, no matter how sweeping the language it chose in the first instance.[11]

Congress's purposes in enacting § 233(a) – to revitalize the public health service and encourage recruitment and retention of its medical personnel, *see* Gonsalves Br. 27-28 – are well served by immunizing PHS workers against *Bivens* claims as well as common law claims. Respondents and their *amici* claim that the purposes that motivated Congress in 1970 are no longer applicable on the ground that those workers can now obtain protection from suit elsewhere. *See, e.g.*, Resp. Br. 61 & n.31. Even if that were true, it would not permit this

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[11] In addition, under Respondents' theory, § 233(a) and the Gonzalez Act, 10 U.S.C. § 1089, which have virtually identical immunity-conferring language, would offer different protection merely because § 233 was enacted just before *Bivens* and the Gonzalez Act was enacted a few years later. *See* Gonsalves Br. 35. In addition, the FTCA judgment bar, enacted decades prior to the *Bivens* decision, could not be interpreted to apply to *Bivens* claims – even though every court of appeals to have addressed the issue has concluded that it does. *See id.* at 29 & n.7; 28 U.S.C. § 2676.

Court to override the statute Congress enacted. Such contentions must be addressed to Congress.[12]

III. Respondents Misread *Carlson* and Ignore the Plain Import of Post-*Carlson* Cases.

1. Like the Ninth Circuit below, Respondents also misread this Court's *Bivens* case law. Their lead contention in this regard is that this case and *Carlson* are "[f]unctionally [e]quivalent." Resp. Br. 19. But that ignores the dispositive difference: § 233(a). In *Carlson*, the question was whether the FTCA itself barred a *Bivens* claim, but there was no "explicit congressional declaration" making the FTCA remedy exclusive. *Carlson* v. *Green*, 446 U.S. 14, 19 (1980). Here, § 233(a) is just such an "explicit congressional declaration." *Id.* As *Carlson* and a host of this Court's subsequent *Bivens* cases have explained, there can be no *Bivens* action where Congress has declared a statutory remedy to be exclusive. *See* Gonsalves Br. 13-14. No more is

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[12] In any event, however, there is no reason to believe that § 233(a) is now unnecessary. *See* Commissioned Officers' Br. 6-7. The statement on the PHS website that the agency provides insurance, *see* Nat'l Immigrant Justice Ctr. Br. 20-21, is a reference to § 233(a) itself. As for outside insurance, Respondents have not established that PHS medical workers can actually obtain affordable insurance that would provide them with adequate protection against claims like Respondents'. *See* Resp. Br. 61 n.54 (citing insurance company website stating coverage limit of $1 million). And as for indemnification by the United States, *see* Resp. Br. 61, it is not automatic, is virtually never offered until the end of a case, and does not provide protection from the difficult and time-consuming burdens of litigation. *See* U.S. Br. 15 n.3 (citing 45 C.F.R. § 35.1).

necessary to demonstrate that *Carlson* concerns a statutory regime that is the opposite of, not equivalent to, that here.

Digging into the lower court record in *Carlson*, Respondents note that one of the defendants there, Robert T. Brutsche, was alleged to be the Assistant Surgeon General and a PHS employee, and claim that "[i]f the Court truly thought § 233(a) barred *Bivens* actions, it would not have ... permitted a *Bivens* claim against the Assistant Surgeon General." Resp. Br. 58. That inference is patently meritless. Nothing in this Court's decision in *Carlson* even mentioned, let alone turned on, Mr. Brutsche's status as a PHS employee. *See Carlson*, 446 U.S. at 16 (identifying defendants as "federal prison officials"). There is no indication that Mr. Brutsche invoked an immunity from suit under § 233(a) in the court of appeals or in this Court. And the *Carlson* briefs and oral argument never so much as identified Mr. Brutsche as a PHS employee, let alone mentioned any issue with respect to Mr. Brutsche's immunity under § 233(a). The passing, undeveloped reference to the PHS in a single line of the underlying complaint, *see* Resp. App. 74a, does not remotely establish that *Carlson* concluded that § 233(a) permits *Bivens* actions. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been ... decided." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 118 (1993) (internal quotation marks omitted).

In fact, although § 233(a)'s scope did not surface in *Carlson* with respect to Mr. Brutsche's individual

immunity, the Court *did* invoke the provision as an example of a statute in which "Congress follow[ed] the practice of explicitly stating when it means to make FTCA an exclusive remedy." 446 U.S. at 20. Respondents contend that *Carlson* understood § 233(a) to bar only non-constitutional malpractice claims, but that interpretation does not bear scrutiny. *Carlson* described § 233(a) as incorporating the type of "contrary expression" that showed Congress did not intend to permit "an action under the FTCA ... as well as a *Bivens* action." *Id.* Thus, *Carlson* was not citing random provisions from the U.S. Code that displaced state law torts. It was citing provisions that showed that Congress knew how to displace *Bivens* remedies with a "contrary expression" when it wished to do so.

In light of § 233(a)'s clear statement of exclusivity, Respondents miss the point when they contend that "[t]here is no principled basis for distinguishing" between the medical personnel in *Carlson* and Cmdr. Gonsalves. Resp. Br. 52. Congress enacted a statute providing additional protection to PHS employees at the request of the Surgeon General in light of a perceived need to revitalize the PHS. *See* 116 Cong. Rec. 42,543 (1970); *id.* at 42,977. Some other federal doctors received similar protections. *See* Gonsalves Br. 31 n.11. Other federal medical personnel, like those employed by the Bureau of Prisons, may never have asked for such protections, or may have asked and been refused. Whatever the reason for these distinctions, Congress's decision to provide PHS officials with additional immunity "is not within [this

Court's] province to second-guess." *Eldred* v. *Ashcroft*, 537 U.S. 186, 222 (2003).

2. Respondents also suggest that Congress simply lacks the power to make the FTCA an exclusive remedy because *Bivens* provides some relief that the FTCA does not. *See* Resp. Br. 52-55. But this position is irreconcilable with the Court's *Bivens* jurisprudence regarding "equally effective" remedies. Once Congress has decided to provide an exclusive statutory remedy, this Court will not supplement Congress's chosen remedial scheme out of a belief that *Bivens* would be more effective.[13]

Carlson itself recognized this point. Its discussion of the efficacy of the FTCA remedy was simply a tool it used to gauge *Congress's intent* in the *absence* of an express statement of exclusivity. Gonsalves Br. 49. And in every *Bivens* case since *Carlson*, this Court has declined to authorize *Bivens* claims even where an alternative remedy was not equally effective, concluding that Congress did not intend to allow them. *See* Gonsalves Br. 50-51 (citing *Wilkie*, *Schweiker*, and *Bush*); *see also United States* v. *Stanley*, 483 U.S. 669, 683 (1987); *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). With

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[13] As explained in Petitioners' opening brief, the FTCA plainly provides constitutionally adequate relief to Respondents here. Gonsalves Br. 51-57. Notably, Respondents do not meaningfully dispute the fact that California law, as incorporated by the FTCA, allows unlimited economic damages and may allow enhanced noneconomic damages for injury that is the product of more than mere negligence. Gonsalves Br. 56 n.17; Resp. Br. 55 n.25.

Congress's intent so plain here, the same result must follow.

Respondents offer no answer to this unbroken line of case law – indeed, they essentially ignore the Court's post-*Carlson* cases on point. Their discussion of those cases is essentially limited to the brief assertion that this Court affirmed a requirement of equal effectiveness in *Wilkie* and *Stanley*. Resp. Br. 56 n.30. Yet those are both cases in which application of such a requirement would have led to a different result. *Wilkie* acknowledged the "inadequacy of [existing] discrete" remedies, but concluded that "any damages remedy ... may come better, if at all, through legislation." *Wilkie* v. *Robbins*, 551 U.S. 537, 551, 562 (2007). And *Stanley* refused to imply a *Bivens* remedy even though that left the plaintiff with *no* remedy at all. 483 U.S. at 682-83.[11]

Finally, Respondents contend that the "'special factors' test does not apply" here "[g]iven that Congress took 'affirmative action' in this case." Resp. Br. 58-59. But Respondents point to the wrong "affirmative action." It is § 233(a), and not the Westfall Act, that is the relevant congressional action here. Gonsalves Br. 51-52.

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[11] Respondent's contention that *Bush* and *Chilicky* are inapposite (Resp. Br. 43) is likewise erroneous, as those cases confirm that there is no "equally effective remedy" requirement. Gonsalves Br. 47-50.

IV. Nothing About Respondents' Factual Allegations Changes the Result in This Case.

In addition to their general "policy" arguments, Respondents and their *amici* also make a case-specific plea for disregarding § 233(a) here. They posit that a *Bivens* remedy against Petitioners in this case, which Respondents view as a particularly egregious example of deliberate indifference, would send a message that might lead to improvements in the overall system for treating immigrant detainees, which they believe is badly broken. *See* Resp. Br. 63-64; ACLU Br. 20-28; Nat'l Immigrant Justice Ctr. Br. 11-20.

But, as this Court has recognized, a *Bivens* action has never been "considered a proper vehicle for altering an entity's policy." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72-74 (2001); *see also id.* (stating that in contrast to *Bivens* actions, "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally"); ACLU Br. 24-25 (describing detainees' suit for injunctive and declaratory relief currently proceeding in district court (citing *Woods v. Myers*, No. 3:07-cv-1078 (S.D. Cal.))). Certainly, Petitioners have no control over such policy determinations. Such matters are properly addressed to Congress, which is apparently already well aware of the issues that Respondents and their *amici* identify, and which has paramount institutional competency to determine the best approach. *See* Reps. Conyers, Lofgren, & Nadler Br. 25; *see also* Resp. Br. 62-63.

With respect to this specific case, without trivializing what happened to Mr. Castaneda, Petitioner takes strong exception to the charge of deliberate indifference. The record does not remotely support the serious public allegations concerning the role of Cmdr. Gonsalves leveled by Respondents and their *amici*. Respondents do not and cannot dispute that Cmdr. Gonsalves acted only as an administrator with no role in the diagnosis or treatment of Mr. Castaneda, and played no part in preparing, submitting, reviewing, approving, or denying any treatment authorization request, or in arranging for (or impeding) visits to outside medical providers. There is thus no basis at all for Respondents' sweeping and undifferentiated assertion that "Petitioners refused to provide [Mr. Castaneda] with a simple skin biopsy they knew was necessary" or engaged in "abject cruelty." Resp. Br. 2, 61.

Indeed, the only conduct by Cmdr. Gonsalves mentioned in Respondents' brief, or suggested in the record, is that he authored a single administrative memorandum stating that an outside specialist and the in-house medical team had determined that any treatment would be elective. Resp. Br. 8; J.A. 167-68. That memorandum accurately reflected the information available to Cmdr. Gonsalves and does not evince deliberate indifference, let alone "abject cruelty," even though crucial information in Mr. Castaneda's records proved to be erroneous. *See* Gonsalves Br. 7, 9.[5]

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[5] The ACLU's *amicus* brief goes outside the record by quoting at length from the deposition of Lt. Walker. ACLU Br. 3 n.1. The

Ultimately, none of these facts has any bearing on the legal question before this Court. But there is no basis here for concluding that Cmdr. Gonsalves acted with deliberate indifference – or, indeed, that he played any role in Mr. Castaneda's treatment at all. Nor is there any basis for stripping Petitioners of immunity in this case in an attempt to change federal policy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case remanded with directions to dismiss the claims against Petitioners.

ACLU's selective and misleading quotation of that deposition is manifestly improper, because the transcript has *never* been made a part of the record in the courts below; because the deposition was taken after the Ninth Circuit stayed discovery on the *Bivens* claims against Petitioners; and because Cmdr. Gonsalves has never been afforded an opportunity to respond to the factual assertions therein. *See e.g. FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990); S. Ct. R. 32.3. Petitioner will not respond to this improper use of non-record discovery material except to state unequivocally that Cmdr. Gonsalves denies the only portion of the quoted deposition testimony that relates to him, which concerns a June 30 entry in Mr. Castaneda's file as to which Cmdr. Gonsalves played no role whatsoever. *See* ACLU Br. 4; J.A. 155-51; Gonsalves Br. 6 & n.2.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

ESTHER HUI, ET AL., PETITIONERS

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether 42 U.S.C. 233(a), which provides that a suit against the United States under the Federal Tort Claims Act is "exclusive of any other civil action" against a commissioned officer or employee of the Public Health Service for injury resulting from the performance of medical functions, bars an action against such an officer or employee based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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In the Supreme Court of the United States

No. 08-1529

ESTHER HUI, ET AL., PETITIONERS

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The question presented in this case is whether 42 U.S.C. 233(a), which provides that a suit against the United States under the Federal Tort Claims Act (FTCA) is "exclusive of any other civil action" against a commissioned officer or employee of the Public Health Service (PHS) for injury resulting from the performance of medical functions, bars an action against a PHS officer or employee based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). PHS personnel play a critical role in the provision of medical care in challenging settings, including federal prisons and immigrant detention centers. A holding that Section 233(a) does not bar *Bivens* claims

would have an adverse impact on the government's ability to recruit, hire, and retain medical personnel for the PHS, and could affect other federal entities that have medical missions covered by similar immunity statutes.

STATEMENT

1. The Public Health Service, which is part of the Department of Health and Human Services (HHS), see 42 U.S.C. 201 *et seq.*, employs more than 6000 commissioned officers as physicians, dentists, nurses, pharmacists, and other medical personnel, and nearly 14,000 civilian employees whose duties involve patient care. PHS personnel are detailed to a number of agencies, including the Department of Homeland Security, Bureau of Prisons, Indian Health Service, and United States Marshals Service. They provide medical care in every State and numerous foreign countries—often in communities most in need of medical care providers. PHS personnel also staff quarantine stations to limit the introduction of communicable diseases into the United States and to prevent their spread. See 42 U.S.C. 264; 42 C.F.R. 71.32, 71.33.

PHS's Commissioned Corps is one of the seven uniformed services of the United States. 42 U.S.C. 201(p), 204, 207. The Commissioned Corps, which includes the Surgeon General, may be called into military service in times of war or national emergency, at which point its personnel become subject to the Uniform Code of Military Justice. 42 U.S.C. 217.

2. Following a December 2005 conviction, Francisco Castaneda, an alien, was imprisoned by the California Department of Corrections (DOC). During his incarceration, Castaneda met several times with DOC medical personnel regarding a lesion on his penis. Although

those personnel recommended a biopsy, Castaneda did not receive one. Pet. App. 2a-3a.

On March 27, 2006, Castaneda was transferred from DOC to United States Immigration and Customs Enforcement (ICE) custody in San Diego in connection with removal proceedings that had been commenced against him. According to the complaint filed in district court (J.A. 343-364),[1] Castaneda complained to medical staff—consisting of PHS personnel serving through the Division of Immigration Health Services (DIHS)—that the lesion on his penis was growing, becoming painful, and producing a discharge. He was examined by a physician's assistant, who recommended a urology consultation and a biopsy. Although that recommendation was approved by DIHS, Castaneda did not receive a biopsy. Over the ensuing months, he repeatedly complained that his condition was worsening. He was seen by several PHS medical personnel and private doctors (including urologists), some of whom were concerned about the possibility of cancer and recommended a biopsy. Others considered the problem to be genital warts. Pet. App. 3a-7a, 42a-48a.

In January 2007, Castaneda saw another urologist, who concluded that the lesion was "most likely penile cancer" and recommended a biopsy. On February 5, 2007, before the scheduled biopsy, Castaneda was released from ICE custody pursuant to the 90-day post-removal-order custody review process under 8 U.S.C. 1231(a) and 8 C.F.R. 241.4.[2] Three days later, he went

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[1] The government assumes the following factual allegations only for purposes of the present appeal.

[2] An immigration judge had issued a removal order against Castaneda on August 1, 2006, and the Board of Immigration Appeals dismissed his appeal of that order on November 9, 2006, making the removal or-

to a hospital and was diagnosed with penile cancer. A week after that, his penis was amputated, and he began undergoing chemotherapy for the metastasized cancer. He died in February 2008. Pet. App. 7a-8a.

3. Castaneda commenced this action three months before he died.[3] He asserted claims against the United States under the FTCA, against state officers and employees under 42 U.S.C. 1983, and against various federal officers and employees, including petitioners, under *Bivens*. Castaneda alleged that the individual federal defendants violated the Fifth and Eighth Amendments of the Constitution by failing to treat his known serious medical condition, purposefully denying treatment, and acting with deliberate indifference to his serious health needs. Pet. App. 8a.

At all relevant times, petitioner Gonsalves was a commissioned officer and petitioner Hui was a civilian physician of the PHS.[4] After certifying that petitioners had acted within the scope of their employment, the government, which then represented petitioners, moved to dismiss the claims against them on the basis of 42 U.S.C. 233(a). Pet. App. 8a-9a. That section provides that the remedy against the United States under the FTCA for personal injury resulting from the performance of medical functions by any PHS commissioned officer or employee "shall be exclusive of any other civil action or

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der administratively final. Therefore, the 90-day deadline for his required custody determination was February 7, 2007.

[3] The representative and heirs of Castaneda's estate have been substituted as plaintiffs and are respondents in this Court. Pet. App. 8a.

[4] All five PHS defendants then in the case petitioned this Court for a writ of certiorari, but respondents dismissed three of them from their suit after the Court granted review. J.A. 408-409. Petitioners Hui and Gonsalves remain in the case.

proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim." 42 U.S.C. 233(a). The district court denied petitioners' motion to dismiss. Pet. App. 41a-80a.

4. The government, on behalf of petitioners, filed an interlocutory appeal. In the meantime, the government admitted liability in the district court on plaintiff's FTCA claim against the United States for medical negligence. J.A. 328-329. Shortly thereafter, and before appellate briefing, the government authorized each petitioner to retain private counsel for representation throughout the remainder of the litigation to ensure that each would receive independent legal advice appropriately focusing on their personal interests in the *Bivens* action.

The court of appeals affirmed the denial of the motion to dismiss the *Bivens* claims. Pet. App. 1a-40a. The court focused its analysis on *Carlson* v. *Green*, 446 U.S. 14 (1980), in which the Court had held that the availability of an FTCA remedy, without more, did not preclude a *Bivens* action against federal officials. According to the court of appeals, a *Bivens* action is available under *Carlson* unless (1) an alternative remedy is both (a) "explicitly declared to be a substitute" for a *Bivens* remedy and (b) "viewed as equally effective," or (2) there are "special factors" that militate against a *Bivens* remedy. Pet. App. 10a. Applying that test, the court of appeals held that Section 233(a) did not preclude a *Bivens* claim. *Id.* at 35a; see *id.* at 10a-40a.

The court of appeals determined that the FTCA remedy preserved by Section 233(a) was not "equally effective" as a *Bivens* remedy because: (1) FTCA damages, unlike *Bivens* damages, are not awarded against individ-

ual defendants; (2) punitive damages are unavailable under the FTCA; (3) FTCA cases, unlike *Bivens* claims, are not tried before a jury; and (4) FTCA liability turns on state law, not uniform nationwide rules. Pet. App. 13a-18a.

The court of appeals also determined that, although Section 233(a) provides that the FTCA is the "exclusive" remedy, Congress did not "explicitly declare[]" in Section 233(a) that the FTCA was a substitute for a *Bivens* action. The court pointed out that Section 233(a) does not mention constitutional claims and that it was enacted before *Bivens* was decided. According to the court, Section 233(a) was intended only to bar a particular set of common-law tort claims related to medical malpractice. Pet. App. 18a-35a.

The court of appeals expressly disagreed with the Second Circuit's conflicting decision in *Cuoco* v. *Moritsugu*, 222 F.3d 99 (2000). The court believed that the Second Circuit misread language in *Carlson* stating that Section 233(a) made the FTCA an exclusive remedy. The court also observed that the Second Circuit failed to address the aspect of *Carlson*'s analysis stating (in its view) that an alternative statutory remedy must be "equally effective" as a *Bivens* remedy. Pet. App. 35a-37a. Finally, the court of appeals held that there were no "special factors" warranting hesitation in permitting a cause of action under *Bivens* in this setting. *Id.* at 37a-39a.

SUMMARY OF ARGUMENT

Section 233(a), which makes an FTCA suit against the United States the "exclusive" remedy for injury arising out of medical treatment furnished by PHS person-

nel and bars "any other civil action," precludes a *Bivens* action against PHS officers or employees.

A. The plain language of Section 233(a) resolves this case. By its terms, Section 233(a) affords PHS officers and employees immunity from "any" civil action arising out of medical care provided in the course of their employment. It draws no distinction between civil actions predicated on common-law tort theories and those based on the Constitution. Section 233(a) instead makes plain that the "exclusive" remedy for injuries resulting from medical treatment provided by PHS personnel is an action against the United States under the FTCA.

That the title of the provision as enacted refers to "[m]alpractice and [n]egligence [s]uits" does not warrant a contrary conclusion. The title cannot trump the unambiguous command of Section 233(a)'s operative terms. In any event, the term "malpractice" does not refer to a specific legal theory for claim, but instead encompasses all derelictions arising from the doctor-patient relationship, including conduct amounting to a constitutional violation.

B. The legislative history confirms Section 233(a)'s unambiguously broad reach. The provision was specifically designed to protect PHS personnel from damages suits because their low pay made it difficult for them to purchase liability insurance. Although *Bivens* had not yet been decided at the time of Section 233(a)'s enactment, the Court had already granted certiorari in that case. And Congress would have had reason to know that claims arising from medical care may be pleaded in a range of ways, extending well beyond common-law negligence. Congress thus meant precisely what it said in granting PHS personnel absolute immunity from all such claims. Congress acted in recognition of the criti-

cal role absolute immunity plays in this context—to eliminate the burdens of defense and the threat of liability arising from lawsuits, however pleaded, alleging deficient medical care. Those substantial burdens would have an adverse impact on the ability of the PHS to recruit personnel to provide medical care in challenging and underserved settings.

C. The Ninth Circuit's reliance on the Westfall Act and *Carlson* v. *Green*, 446 U.S. 14 (1980), was misplaced. In extending the personal immunity conferred on federal employees generally, the Westfall Act, enacted in 1988, added an explicit carve-out for *Bivens* claims. 28 U.S.C. 2679(b)(1) and (2)(A). But that carve-out applies only to the new immunity Congress conferred in the Westfall Act—not to broader, preexisting grants of immunity in separate statutes like Section 233(a). The Westfall Act does not expressly or impliedly repeal Section 233(a)'s unqualified grant of personal immunity to PHS personnel.

Similarly, *Carlson* indicates that the Ninth Circuit's decision was in error. In rejecting the argument that the FTCA was the exclusive remedy for the conduct alleged there, the Court in *Carlson* explained: "This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See * * * 42 U.S.C. § 233(a)." 446 U.S. at 20. By identifying Section 233(a) as a quintessential example of when Congress has made the FTCA an exclusive remedy, thereby precluding a *Bivens* action against individual federal officers and employees, *Carlson* strongly supports the government's interpretation. And this Court's post-*Carlson* precedents confirm that an alternative remedy need not be "equally effective" in order to foreclose a

Bivens action—especially where, as here, Congress has expressly provided that the alternative remedy is "exclusive" of an action against the individual federal officer or employee.

ARGUMENT

SECTION 233(a) MAKES A CLAIM AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT THE "EXCLUSIVE" REMEDY FOR INJURY ARISING OUT OF MEDICAL TREATMENT FURNISHED BY PUBLIC HEALTH SERVICE PERSONNEL AND BARS "ANY OTHER CIVIL ACTION," INCLUDING *BIVENS* CLAIMS

Section 233(a)'s grant of immunity to PHS personnel is unambiguous and unqualified. Unsurprisingly, neither the Ninth Circuit nor respondents provide any reading of the operative terms of Section 233(a) that would permit a *Bivens* action against a PHS officer or employee for injury arising out of the performance of their medical functions. As this Court's precedents recognize, Section 233(a)'s express mandate that the FTCA remedy against the United States is "exclusive" of "any other civil action" resolves this case.

A. The Plain Language Of Section 233(a) Bars Respondents' Claims Against Individual PHS Personnel

"As in any case of statutory construction, [this Court's] analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). "And where the statutory language provides a clear answer, it ends there as well." *Ibid.* This is such a case.

1. Section 233(a) of Title 42 provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the FTCA]

> * * * for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions * * * by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. 233(a).

By its terms, Section 233(a) affords PHS officers and employees immunity from "any" civil action arising out of medical care provided in the course of their employment. The text is broad and unqualified. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("any" has an "expansive meaning" (internal quotation marks omitted)). It categorically bars "any other civil action" based on "the same subject-matter" for which the FTCA provides a remedy, drawing no distinction between actions predicated on common-law tort theories and those based on the Constitution. Section 233(a) therefore makes plain that the "exclusive" remedy for any injuries resulting from medical treatment provided by PHS personnel is an action against the United States under the FTCA.

This Court itself has recognized Section 233(a)'s express command. In *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court identified Section 233(a) as a statutory provision making the FTCA an exclusive remedy, in lieu of individual—including *Bivens*—liability. Indeed, the Court rejected the contention that the FTCA, standing alone, afforded an exclusive remedy and therefore barred a *Bivens* action by a federal prisoner in part because "Congress follows the practice of explicitly stating

when it means to make FTCA an exclusive remedy. See * * * 42 U.S.C. § 233(a)." *Id.* at 20; see pp. 25-28, *infra* (discussing *Carlson*). Consistent with the Court's recognition in *Carlson*, every court of appeals that has considered the issue other than the Ninth Circuit in this case has held that Section 233(a)'s grant of immunity bars *Bivens* claims.[5] In fact, even the Ninth Circuit had previously so held in unpublished decisions. See *Miles* v. *Daniels*, 231 Fed. Appx. 591, 591-592 (2007); *Zanzucchi* v. *Wynberg*, No. 90-15381, 1991 WL 83937, at *2 (May 21, 1991).

The correctness of that conclusion is reinforced by the uniform interpretation of the similar language in the FTCA's judgment-bar provision, which states: "The judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Every court of appeals to have considered the question has correctly held that Section 2676's judgment bar applies to *Bivens* actions in the same manner that it applies to other suits against fed-

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[5] See *Cuoco* v. *Moritsugu*, 222 F.3d 99 (2d Cir. 2000); *Anderson* v. *BOP*, 176 Fed. Appx. 242, 243 (3d Cir.) (per curiam), cert. denied, 547 U.S. 1212 (2006); *Butler* v. *Shearin*, 279 Fed. Appx. 274, 275 (4th Cir. 2008) (per curiam), aff'g No. 04-2496, 2006 WL 6083567, at *7 (D. Md. Aug. 29, 2006); *Cook* v. *Blair*, 82 Fed. Appx. 790, 791 (4th Cir. 2003) (per curiam), aff'g No. 02-609, 2003 WL 23857310, at *2 (E.D.N.C. Mar. 21, 2003); *Montoya-Ortiz* v. *Brown*, 154 Fed. Appx. 437, 439 (5th Cir. 2005) (per curiam); *Schrader* v. *Sandoval*, No. 98-51036, 1999 WL 1235234, at *2 (5th Cir. Nov. 23, 1999); *Walls* v. *Holland*, No. 98-6506, 1999 WL 993765, at *2 (6th Cir. Oct. 18, 1999); *Beverly* v. *Gluch*, No. 89-1915, 1990 WL 67888, at *1 (6th Cir. May 23, 1990).

eral employees that arise out of the same subject matter as the FTCA action.[6]

2. Rather than focusing on the operative text of Section 233(a), the court of appeals relied on its title ("Defense of Certain Malpractice and Negligence Suits") as appearing in the public law in which it was enacted, reading that title to exclude suits based on the Constitution. Pet. App. 22a-23a & n.11; see Br. in Opp. 14.[7] The title of a statutory provision, however, cannot trump the unambiguous language of the provision's operative terms. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he title of a statute * * * [is] of use only when [it] shed[s] light on some ambiguous word or phrase.") (internal quotation marks and citation omitted; brackets in original). As discussed above, there is nothing ambiguous about the terms of Section 233(a).

In any event, Section 233(a)'s title does not refer solely to actions based on the common law or sounding

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[6] See, *e.g.*, *Unus* v. *Kane*, 565 F.3d 103, 122 (4th Cir. 2009), petition for cert. pending (filed Sept. 3, 2009) (No. 09-294); *Hallock* v. *Bonner*, 387 F.3d 147, 154-155 (2d Cir. 2004), vacated on other grounds, 546 U.S. 345 (2006); *Farmer* v. *Perrill*, 275 F.3d 958, 963 (10th Cir. 2001); *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184-185 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437-1438 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989); *Serra* v. *Pichardo*, 786 F.2d 237, 241 (6th Cir.), cert. denied, 479 U.S. 826 (1986).

[7] When Section 233 was codified, its title was changed to "Civil actions or proceedings against commissioned officers or employees," and the subtitle "Exclusiveness of remedy" was added to subsection (a). Compare Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 4, 84 Stat. 1870, with 42 U.S.C. 233 (1970). Title 42 has not, however, been enacted into positive law. See 1 U.S.C. 204(a) & note; *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993).

in negligence. The term "malpractice," in particular, refers not to a specific type of legal theory or claim, but rather to underlying conduct—*i.e.*, the professional misfeasance that may give rise to a cause of action. See, *e.g.*, *Webster's Third New International Dictionary* 1368 (1993) ("malpractice" is "a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury"); 1 David W. Louisell & Harold Williams, *Medical Malpractice* § 8.10, at 8-151 (2006) (*Medical Malpractice*) ("'malpractice' is a broad term including all derelictions of physicians committed in the course of the physician-patient relationship"). In addition, the title's reference to both "malpractice" and "negligence" suits suggests that "malpractice" refers to tortious conduct going beyond "negligence" and covering as well "deliberate indifference to serious medical needs"—the constitutional standard for deficient medical care. *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). The Court's opinion in *Estelle* similarly implies that suits alleging deliberate indifference, in violation of the Constitution, are a subset of suits based on malpractice, rather than a wholly distinct category. See *ibid.* ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to medical needs.").

B. Section 233(a)'s Legislative History Confirms The Broad Nature And Purpose Of Congress's Grant Of Immunity

As discussed above, Section 233(a)'s text provides an unequivocal expression of Congress's intent to shield PHS personnel from all suits arising out of their medical

functions. Section 233(a)'s limited legislative history, informed by the realities of practicing medicine as part of the PHS, confirms that statutory purpose.

1. The overarching objective of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868, of which Section 233(a) was a part, was to facilitate PHS's provision of medical care in underserved areas. See § 2, 84 Stat. 1868; H.R. Rep. No. 1662, 91st Cong., 2d Sess. 1 (1970). Because PHS personnel could not afford professional liability insurance, the Surgeon General requested an amendment—Section 233(a)—to protect them from damage suits arising out of the medical care they provided. See, *e.g.*, 116 Cong. Rec. 42,543 (1970) (Rep. Staggers, the sponsor in the House of Representatives) (PHS physicians "cannot afford to take out the customary liability insurance as most doctors do," "because of the low pay that so many of those who work in the [PHS] receive."); *id.* at 42,977 (Sen. Javits) (PHS personnel "just could not afford to take out the customary liability insurance.").

To allow a suit against a PHS officer or employee, whether based on a *Bivens* theory or any other, would undermine Section 233(a)'s purpose of protecting PHS personnel from personal financial liability arising out of their medical duties. And that, in turn, would undermine PHS's ability to recruit qualified medical personnel to furnish critically needed services. See *Cuoco* v. *Moritsugu*, 222 F.3d 99, 108 (2d Cir. 2000) ("[Section 233(a)] may well enable the Public Health Service to attract better qualified persons to perform medical, surgical and dental functions in order better to serve, among others, federal prisoners."); cf., *e.g.*, *Bogan* v. *Scott-Harris*, 523 U.S. 44, 52 (1998) ("[T]he threat of liability may significantly deter service in local government, where

prestige and pecuniary rewards may pale in comparison to the threat of civil liability."); *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988) ("The prospect of personal liability for official acts * * * would undoubtedly lead to new difficulties and expense in recruiting [personnel] for the programs Congress has established.").

2. In reaching a contrary result, the Ninth Circuit reasoned that this Court had not rendered its decision in *Bivens* at the time of Section 233(a)'s enactment, and that Congress therefore could not have had constitutional claims in mind. Pet. App. 21a; see Br. in Opp. 19-20. Even if true (a dubious assertion for reasons explained below), there is no reason to believe that Congress would have wanted PHS personnel to be subject to such claims—especially given the unqualified nature of Section 233(a)'s preclusion of "any other civil action." Under the court of appeals' reasoning, no pre-*Bivens* statute—no matter how absolute its text or how clear and categorical its intent—could create an exclusive remedy. But as this Court has repeatedly recognized, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Yeskey*, 524 U.S. at 212 (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)).[8]

Moreover, five years after *Bivens* was decided, Congress passed the Gonzalez Act, Pub. L. No. 94-464, § 1(a), 90 Stat. 1985, which affords immunity to medical personnel in the Armed Forces and which, like Section 233(a), makes the FTCA remedy "exclusive of any other

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[8] The FTCA's judgment bar, 28 U.S.C. 2676, was enacted as part of the original FTCA in 1948. Act of June 25, 1948, ch. 646, 62 Stat. 984. Yet, as noted previously (p. 11, *supra*), every court of appeals to have addressed the issue has agreed that it covers *Bivens* claims.

civil action or proceeding by reason of the same subject matter." 10 U.S.C. 1089(a). Congress relied on Section 233(a) as a model for that provision. See S. Rep. No. 1264, 94th Cong. 2d Sess. 8 (1976) ("legislation having a comparable effect presently exists for * * * medical personnel of the * * * Public Health Service"). As the accompanying Senate Report stated, "[t]his protection is designed to cover *all* potential financial liability." *Id.* at 2 (emphasis added). Thus, after *Bivens*, Congress reaffirmed the completeness of Section 233(a)'s immunity.

In any event, Congress may well have been aware of the concept of a constitutional tort when it enacted Section 233(a) in December 1970. See *Bell* v. *Hood*, 327 U.S. 678, 684-685 (1946) (holding that the issue of the availability of damages in actions against federal agents for constitutional violations warranted the exercise of federal-question jurisdiction, while reserving judgment on whether the plaintiff had successfully stated a cause of action). Indeed, the Court had granted certiorari in *Bivens* six months before Congress enacted Section 233(a). 399 U.S. 905 (1970).

At the very least, Congress must have been aware when it enacted Section 233(a) that suits seeking damages for allegedly tortious conduct in connection with the provision of medical care may be pleaded in different ways. Lack of informed consent, for example, can be alleged as negligence, battery, or both. See *Medical Malpractice* § 8.06, at 8-100 to 8-101 ("Historically, the law did not make clear whether the doctrine of informed consent was rooted in assault and battery or in negligence."). Other tort claims arising out of malpractice include abandonment, fraud, willful misconduct, false imprisonment, defamation, invasion of privacy, and infliction of emotional distress (negligent and intentional).

Id. § 8.10, at 8-145 to 8-158. Given the difficult settings in which they practice, PHS officers and employees face a heightened risk of such claims (often lacking merit) beyond common-law negligence. Accordingly, Congress would have understood the insufficiency of protection against negligence suits alone and intended Section 233(a), through its preclusion of "*any* other civil action" by reason of the same subject matter, to bar such suits categorically, regardless of the legal theory.

Applying Section 233(a) by its terms to bar *Bivens* claims is not tantamount to licensing unconstitutional conduct by PHS personnel, any more than it is to licensing negligent or intentional common-law torts. Nor does this bar prevent compensation for injuries, given the availability of the FTCA. Rather, Section 233(a) simply reflects Congress's recognition of the critical role of absolute personal immunity from suit in this context. As this Court has recognized for other government actors, absolute immunity—even from suits alleging constitutional violations—is justified when it advances important societal values. See, *e.g.*, *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 859 (2009) ("absolute immunity reflects 'a balance' of 'evils'") (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), cert. denied, 339 U.S. 949 (1950)). In enacting Section 233(a), Congress struck that balance in the manner it deemed appropriate: it determined that facilitating the provision of medical care in challenging, underserved settings necessitates affording those who furnish that care with immunity from personal liability, while still ensuring the availability of compensation under the FTCA for any injuries sustained. That balance makes sense both because the FTCA furnishes what Congress views as the appropriate set of substantive and procedural provisions for tort

suits based on the acts of government employees generally and because in the particular context of personal damage actions against PHS personnel, "allegations of government misconduct are 'easy to allege and hard to disprove.'" *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006) (quoting *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004)). Section 233(a)'s protection would mean little if plaintiffs could sue PHS personnel for malpractice, subjecting them to the burdens of defending against a lawsuit and the threat of ruinous liability, through the mechanism of a *Bivens* suit alleging that the malpractice violated the Constitution.

Other means exist to ensure the punishment and deterrence of bad conduct. See, *e.g.*, *Barr* v. *Matteo*, 360 U.S. 564, 576 (1959) (Harlan, J.) ("[T]here are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner."). Individual PHS officers or employees may face sanctions in the form of adverse personnel action by the government, professional discipline by medical licensing boards, and even prosecution for criminal violations. And, of course, the grant of immunity does not extend to conduct not "resulting from the performance of medical, surgical, dental, or related functions * * * while acting within the scope of [PHS] office or employment" (42 U.S.C. 233(a))—*e.g.*, sexual assault of a patient unrelated to treatment.

3. The government's experience in the relatively short period since the Ninth Circuit's decision—the first court of appeals' decision to permit PHS personnel to be sued for *Bivens* claims—confirms that the interests at stake are not hypothetical. As of the submission of this brief, approximately 75 PHS officers and employees

working for DIHS and the Bureau of Prisons alone are named in suits alleging *Bivens* claims—the majority of which were filed after the Ninth Circuit issued its decision below. A decision by this Court in favor of respondents, applying the Ninth Circuit's unprecedented rule to the rest of the country, would further encourage such suits by prisoners, alien detainees, and others. The great majority of these suits lack merit, but that often can be established only after litigation and its attendant burdens have taken their toll on individual PHS officers and employees. The result would be to undermine the ability of the PHS to recruit qualified personnel to serve in some of the nation's most challenging and underserved settings. See 08-1547 Commissioned PHS Officers Ass'n Amicus Br. 2 ("The outcome of this case will have a profound effect on the ability of the USPHS to recruit and retain medical professionals."); p. 14, *supra*.[9]

C. Neither The Westfall Act Nor This Court's *Bivens* Jurisprudence Supports The Ninth Circuit's Decision

1. a. Instead of focusing on Section 233(a)'s text and legislative history, the court of appeals relied in signifi-

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[9] Contrary to respondents' suggestion (Br. in Opp. 36-37), the burdens of litigation on PHS personnel are substantial. Indemnification determinations by the government are discretionary. See 45 C.F.R. 36.1(a) and (c). Absent "exceptional circumstances," these determinations are made on a case-by-case base *after* there is an adverse judgment against the employee. 45 C.F.R. 36.1(a) and (c). Even assuming indemnity is ultimately provided, it protects the individual only from liability for the damages judgment, rather than relieving the individual of the burdens and stresses of the litigation process. See, *e.g.*, *Osborn* v. *Haley*, 549 U.S. 225, 238 (2007) (immunity exempts defendants "not simply from liability, but from suit"); *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951) (referring to the "inconvenience and distractions of a trial").

cant part on the text and legislative history of a separate statute—the 1988 amendments to the FTCA, known as the Westfall Act—that nowhere purports to diminish the unqualified immunity conferred on PHS personnel by Section 233(a). See Pet. App. 24a-32a. The Westfall Act extended the personal immunity provided by 28 U.S.C. 2679(b) (originally enacted in 1961, see Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539) to a broader class of injuries, while carving out *Bivens* claims from that enhanced scope. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4564. But a review of the Act and its background shows that it has no effect on the scope of personal immunity (including as to *Bivens* claims) conferred by other, preexisting statutes such as Section 233(a).

Prior to the Westfall Act, Section 2679(b) made the FTCA the exclusive remedy only for injury resulting from a federal employee's operation of a motor vehicle.[10] The Westfall Act, via new Section 2679(b)(1), extended the exclusivity of the FTCA remedy to any injury "resulting from the negligent or wrongful act or omission" of any federal employee. 28 U.S.C. 2679(b)(1). At the same time, however, the Westfall Act added Section 2679(b)(2)(A), which states that Section 2679(b)(1)'s pro-

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[10] The pre-Westfall Act provision read as follows:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

28 U.S.C. 2679(b) (1982).

vision of an exclusive FTCA remedy "does not extend or apply to a civil action against an employee of the Government * * * brought for a violation of the Constitution." 28 U.S.C. 2679(b)(2)(A); see App., *infra*, 3a.

Based on Section 2679(b)(2)(A), the court of appeals read the Westfall Act to reinforce its view that Section 233(a)—though enacted long before the Westfall Act and in legislation separate from the FTCA (see p. 14, *supra*)—does not bar a claim based on the Constitution. Pet. App. 25a-26a. The district court went even further. That court read Section 233(a)'s reference to "[t]he remedy against the United States" provided by 28 U.S.C. 1346(b) to incorporate Section 1346(b)(1)'s statement that the FTCA remedy is "[s]ubject to the provisions of chapter 171 of this title"; from that premise, the court then read Section 2679(b)(2)(A)—a provision found in chapter 171—to limit Section 233(a)'s exclusivity. Pet. App. 59a-62a; see Br. in Opp. 15-18.[11]

Both courts erred in attaching such significance to 28 U.S.C. 2679(b)(2)(A). First, Section 233(a) does not somehow cross-reference Section 2679 via Section 1346, as the district court suggested. Section 233(a) refers to the "remedy against the United States provided by sec-

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[11] Section 1346(b)(1), part of the FTCA, provides in relevant part:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1).

tions 1346(b) and 2672" (the FTCA) only for the purpose of specifying which remedy against the United States is "exclusive" of any civil action against the PHS officer or employee. Section 2679(b)(2)(A) is not part of that remedy against the United States; indeed, it does not provide, alter, or affect a remedy "*against the United States*" at all. And once the remedy against the United States is so identified, Section 233(a) itself (without further reference to Section 1346 or any other provision of the FTCA) makes that remedy "exclusive" of "any other civil action" against the PHS officer or employee. Section 233(a)'s reference to the FTCA therefore does not limit the unrestricted scope of personal immunity provided to PHS personnel.

Second, nothing in Section 2679(b)(2)(A) itself repeals Section 233(a)'s preexisting grant of immunity to PHS personnel, as the court of appeals suggested. Section 2679(b)(2)(A) was added in 1988, 18 years after Section 233(a)'s enactment. Section 2679(b)(2)(A) excludes constitutional torts only from the personal immunity that those same 1988 amendments to the FTCA had just conferred. See 28 U.S.C. 2679(b)(2)(A) (providing that Section 2679(b)(1), as added by the Westfall Act § 5, 102 Stat. 4564, "does not extend or apply to" a *Bivens* action). Nothing in the Westfall Act or its legislative history purported to limit the distinct (and more expansive) personal immunity previously conferred in separate statutes like Section 233(a). To the contrary, as the House Report noted, the Westfall Act did "not change the law, as interpreted by the courts, with respect to the availability of other recognized causes of action, nor does it either expand or diminish rights established under other Federal statutes." H.R. Rep. No. 700, 100th Cong., 2d Sess. 7 (1988); see *Gutierrez* v. *Ada*, 528 U.S.

250, 257-258 (2000) ("[L]ater laws that 'do not seek to clarify an earlier enacted general term' and 'do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute,' are 'beside the point' in reading the first enactment.") (quoting *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998)).[12]

Had Congress not enacted Section 2679(b)(2)(A), the immunity conferred by Section 2679(b)(1) would bar a *Bivens* action. Likewise, the absence of a carve-out for *Bivens* claims from the immunity conferred by Section 233(a)—either in Section 233 itself or in any other provision—has the same import. Cf. *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

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[12] Both the court of appeals (Pet. App. 26a-28a) and respondents (Br. in Opp. 21-22) rely on the Westfall Act's legislative history to argue that Congress viewed the immunity conferred by that Act as identical in scope to the immunity conferred by Section 233(a). In particular, they cite the statement of a Justice Department official that "the exclusive remedy provision adopted by the bill" "simply extends * * * to all Federal employees" the "exclusive remedy provisions [that] already * * * apply to * * * physicians employed by various agencies." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Gov't Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 58 (1988) (testimony of Robert L. Willmore, Deputy Assistant Attorney General, Civil Division). But that statement is unremarkable: the exclusive remedy provision of the Westfall Act is Section 2679(b)(1), and it did just what Mr. Willmore described. What distinguishes the immunity conferred by the Westfall Act from that conferred by Section 233(a) is not this exclusive remedy provision, but the carve out of *Bivens* claims found in Section 2679(b)(2)(A), which Mr. Willmore did not mention.

Accordingly, to read Section 2679(b)(2)(A) to strip PHS officers and employees of immunity from suit in any civil action, despite Section 233(a)'s unqualified grant of individual immunity to PHS personnel, would amount to an implied repeal of Section 233(a), a more specific statute. "[N]ormally the specific governs the general." *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007). And "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *National Ass'n of Homebuilders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks omitted; brackets in original). Because the Westfall Act neither reflects a "clear and manifest" intent to repeal Section 233(a)'s conferral of immunity (*ibid.*) nor "expressly contradict[s]" the grant of immunity (*Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976)), the Westfall Act cannot be deemed to have implicitly repealed Section 233(a).

b. Respondents contend that *United States* v. *Smith*, 499 U.S. 160 (1991), supports their position. Br. in Opp. 29-31. *Smith*, however, neither states nor implies that the Westfall Act's exclusion of *Bivens* claims from its general grant of immunity overrides any broader, preexisting grant of immunity to specified officers and employees under other statutes. The Court in *Smith* addressed the different argument that federal employees who were protected by preexisting immunity statutes could not *benefit* from Westfall Act immunity to the extent certain conduct was not previously covered. See *Smith*, 499 U.S. at 172-173. That issue arose on the Court's assumption that 10 U.S.C. 1089(a) did not provide immunity for malpractice committed abroad. *Smith*, 499 U.S. at 171-172. In that context, the Court

properly held that personnel otherwise covered by Section 1089 could still "benefit from the more generous immunity available under the" Westfall Act. *Id.* at 173. But that conclusion in no way supports respondents' contention that the Westfall Act strips PHS personnel of the protection accorded to them under the separate grant of immunity in Section 233(a). Even the court of appeals in this case concluded that *Smith* had "little relevance" in supporting respondents' position. Pet. App. 30a n.16. As *Smith* itself recognized, "[w]hen Congress want[s] to limit the scope of immunity * * * it d[oes] so expressly." 499 U.S. at 173. Section 2679(b)(2)(A) provides no such express limitation on the immunity conferred by Section 233(a). To the contrary, Section 2679(b)(2)(A)'s text makes clear that it is the immunity newly conferred by the Westfall Act itself—and only that immunity—that does not extend to *Bivens* claims.

2. The Ninth Circuit's decision is also inconsistent with this Court's *Bivens* jurisprudence.

a. In *Carlson*, the Court held that the FTCA standing alone did not bar a *Bivens* claim against federal officials. 446 U.S. at 18-23. The Court stated that, under governing principles at the time, a *Bivens* claim would lie in that case unless (1) there were "special factors counselling hesitation in the absence of affirmative action by Congress," or (2) "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-19. The Court in *Carlson* found neither condition satisfied there. In particular, the Court found nothing in the FTCA itself indicating that Congress meant to preclude *Bivens* actions; to the contrary, it stated that the legislative history of a post-*Bivens* 1974 amendment to the FTCA

made it "crystal clear" that Congress viewed the FTCA and *Bivens* as complementary. *Id.* at 19-20.[13]

But *Carlson* did not involve Section 233(a)—an immunity statute separate and apart from the FTCA that expressly makes the FTCA remedy against the United States the "exclusive" remedy available for the type of injury asserted (personal injury arising from the provision of medical care by PHS personnel). As the Court in *Carlson* itself recognized, that distinction is dispositive. In rejecting the argument that the FTCA was the exclusive remedy for the injuries alleged there, the Court in *Carlson* explained:

> This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U.S.C. § 4116(a), *42 U.S.C. § 233(a)*, 42 U.S.C. § 2458a, 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (malpractice by certain Government health personnel).

446 U.S. at 20 (emphasis added). By identifying Section 233(a) as a quintessential example of a statute in which Congress has made the FTCA an exclusive remedy, thereby precluding a *Bivens* action against individual federal officers and employees, *Carlson* confirms the government's interpretation of Section 233(a) here. That reading is also consistent with *Carlson*'s caution

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[13] The text of the 1974 amendment to the FTCA did not expressly preserve *Bivens* claims. As explained above (p. 20, *supra*), when Congress subsequently amended the FTCA in 1988 to make the FTCA remedy against the United States the exclusive remedy for injuries based on the conduct of federal employees generally, it expressly carved out *Bivens* claim from that grant of immunity. See 28 U.S.C. 2679(b)(2)(A).

that Congress does not have to recite any specific "magic words" in order to designate an alternative remedy as exclusive, and thus a substitute for any *Bivens* cause of action. *Id.* at 19 n.5.

Relying on the use of the term "malpractice" in the Court's parenthetical quote above, respondents argue that *Carlson*'s reference to Section 233(a) was no more than a recognition that Section 233(a) made the FTCA the exclusive remedy for negligent provision of medical care by PHS personnel. Br. in Opp. 23-24. But, as previously explained (pp. 12-13, *supra*), the term "malpractice" describes conduct that can be pleaded not just as common-law negligence but also as a constitutional violation. More significantly, the whole point of *Carlson*'s reference to Section 233(a) and similarly worded statutes was to underscore the contrast between those statutes that precluded a *Bivens* cause of action and the FTCA itself, which did not. The only question before the Court in *Carlson* was the availability of a *Bivens* action, and Section 233(a) was "significant" in resolving that question only because it showed how Congress could bar such actions by explicitly providing that the FTCA remedy would be exclusive. If Section 233(a) was like the FTCA in *not* barring *Bivens* claims, it is hard to understand what point the Court could have been making in contrasting the two.

Moreover, contrary to the Ninth Circuit's reading (Pet. App. 10a), *Carlson* did not impose an independent requirement that an alternative remedy must be "equally effective" in order to foreclose a *Bivens* action. Rather, as the Court emphasized, what mattered was Congress's intent. See *Carlson*, 446 U.S. at 23 ("[W]ithout a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA

remedy."). In *Carlson*, the Court read the legislative history accompanying a 1974 amendment to the FTCA as indicating that Congress did not regard the FTCA as providing an exclusive remedy in that context. *Id.* at 19-20. The Court's discussion of the relative effectiveness of the FTCA remedy and a *Bivens* claim served as supporting evidence of Congress's intent. See *id.* at 20-21 ("Four additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respondent to an FTCA action."). Thus, the *Carlson* Court assessed the effectiveness of an alternative remedy only as part of an inquiry into Congress's intent, not as an independent factor. *Id.* at 18-19 (no *Bivens* cause of action where "*Congress* has provided an alternative remedy which *it* * * * viewed as equally effective") (emphases added); *id.* at 19 (asking whether Congress has identified another remedy, "equally effective *in the view of Congress*") (emphasis added). In a case like this one, where the statutory text makes clear Congress's mandate that the FTCA is "exclusive" of "any other civil action" against the individual officer or employee, no further inquiry is necessary.[14]

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[14] The FTCA provides for the recovery of compensatory damages for injuries caused by the negligent or wrongful acts of government employees. Congress therefore assured the availability of a meaningful remedy when it enacted Section 233(a). *Carlson* noted the differences between *Bivens* suits and FTCA suits—most notably, the unavailability of punitive damages and jury trials in FTCA suits. 446 U.S. at 21-23. Those differences reflect Congress's judgment in enacting the FTCA that these additional features are not necessary for a fair system of compensation for persons injured by the acts of government employees. It therefore is not surprising that Congress found the FTCA to be an adequate alternative remedy when it enacted Section 233(a).

b. This Court's post-*Carlson* precedents make clear that a *Bivens* cause of action is unavailable here. Since *Carlson*, the Court has consistently expressed a strong reluctance to recognize the availability of a *Bivens* cause of action in new contexts—even in the absence of an express preclusive provision in an Act of Congress, and without an inquiry into whether an alternative remedy is "equally effective." See, *e.g.*, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability."); *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) (*Bivens* remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified."); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68-69 (2001) ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants. * * * So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability."); *Chilicky*, 487 U.S. at 421-422, 423 ("The absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation. * * * When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies."); *Bush* v. *Lucas*, 462 U.S. 367, 378, 388 (1983) ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or per-

haps even by the statutory remedy itself, that the courts' power should not be exercised. * * * That question [as to availability of a *Bivens* cause of action] obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff.").

Thus, as the D.C. Circuit has noted, "subsequent to *Carlson*, the Court clarified that there does not need to be an equally effective alternate remedy" or an explicit congressional repudiation in order to bar a *Bivens* action. *Wilson* v. *Libby*, 535 F.3d 697, 708 (2008), cert. denied, 129 S. Ct. 2825 (2009); see *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (per curiam) ("As we read *Chilicky* and *Bush* together, then, courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies.").

Here, the plain text of Section 233(a) precludes a *Bivens* action against PHS personnel. Respondents must instead seek relief in their FTCA action against the United States, which Congress expressly declared to be "exclusive."[15]

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[15] Although Congress's affirmative statement in Section 233(a) of the exclusivity of the FTCA remedy is sufficient to resolve the matter, PHS's status as a uniformed service (p. 2, *supra*), the important purposes associated with protecting PHS personnel from the burdens of litigation and liability (pp. 14-19, *supra*), and the FTCA's reticulated remedial scheme, constitute—along with Section 233(a)—"special factors counselling hesitation" against judicial creation of a cause of action under *Bivens*. *Carlson*, 446 U.S. at 18 (citation omitted); see, *e.g.*, *Arar* v. *Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc) ("'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to con-

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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sider."). Moreover, PHS Commissioned Corps personnel may be called into military duty, including in areas of emergency or conflict that demand custodial care, which makes the case for their immunity from *Bivens* suits particularly strong. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669 (1987) (no *Bivens* remedy for injuries that arise out of activity incident to military service); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (no *Bivens* remedy for alleged racial discrimination in military assignments and evaluations).

APPENDIX

1. 10 U.S.C. 1089 provides in pertinent part:

Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title.

* * * * *

2. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

3. 28 U.S.C. 2676 provides:

Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

4. 28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

* * * * *

5. 42 U.S.C. 233 provides in pertinent part:

Civil actions or proceedings against commissioned officers or employees

(a) Exclusiveness of remedy

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

* * * * *

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No. 08-1529

In the Supreme Court of the United States

ESTHER HUI, ET AL.,

Petitioners,

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project ("NPP") of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners, including immigration detainees like the subject of this case. The NPP currently is counsel in *Woods* v. *Myers*, No. 3:07-cv-1078 (S.D. Cal.), a putative class action seeking to remedy alleged unconstitutional conditions at the facility at which the decedent in this matter was detained prior to his release and ultimate death. In addition, the NPP is litigating *American Civil Liberties Union* v. *United States Department of Homeland Security*, No. 1:08-cv-01100 (D.D.C.), which alleges that the Department of Homeland Security improperly withheld records related to deaths in immigration detention.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

STATEMENT

This case concerns a deliberate and unconstitutional denial of medical care so shocking that the district court said it "should be taught to every law student as conduct for which the moniker 'cruel' is inadequate." Pet. App. 88. The case arises from the death of Francisco Castaneda, an immigration detainee who spent almost 11 months in the custody of Immigration and Customs Enforcement ("ICE"). Petitioners are officers of the U.S. Public Health Service ("PHS") assigned through ICE's Division of Immigration Health Services ("DIHS") to provide medical care to detainees at an ICE facility in San Diego. The record demonstrates that petitioners knew Castaneda had a lesion on his penis that was painful, growing in size, and exuding discharge. *Id.* at 47. They also knew Castaneda had a family history of cancer, and that an oncologist had found that the lesion "require[d] urgent urologic assessment of biopsy and definitive treatment." *Id.* at 47-48. Nonetheless, DIHS officers refused to allow the oncologist to admit Castaneda because it would not be "cost effective." *Id.* at 48. Petitioner Hui, the PHS physician who was responsible for Castaneda's care, knew of the oncologist's recommendation but failed to arrange for an outpatient biopsy because she deemed it an "elective" procedure. *Id.* at 49; J.A. 125.

As Castaneda's condition worsened—his lesion was described as "exploding," "macerated," "bleeding," and emitting a "malodorous smell," and Castaneda was in severe distress and had difficulty urinating—DIHS officials still refused to order a biopsy, even though they recognized that Castaneda's penis had become so damaged that it would eventually require partial surgical removal. Pet. App. 7, 50, 52.

Although DIHS officials in Washington had approved a Treatment Authorization Request for a biopsy, J.A. 114-115, petitioner Gonsalves continued to insist that "any surgical intervention * * * would be elective in nature," and that the care Castaneda was receiving was "appropriate, and in accordance with our policies." J.A. 167-168. To downplay the severity of Castaneda's condition and maintain the fiction that the treatment he required was "elective," the district court found "compelling evidence" that entries made by DIHS personnel on Castaneda's chart misrepresented critical information from outside doctors who examined him. Pet. App. 86-88.

The district court found that the allegations in this case, if true, "bespeak of conduct that transcends negligence by miles" and present "one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered." Pet. App. 82. More than 30 exhibits from petitioners' "own official medical records document[] their knowledge of the fact that several physicians had concluded that [Castaneda]'s lesion was very likely penile cancer, and that he needed a biopsy." *Ibid.* Respondents have "already produced at this early stage in the litigation [evidence that is] more thorough and compelling than the complete evidence compiled in some meritorious Eighth Amendment actions." *Id.* at 83.

Additional evidence that became available after the district court's opinion sheds further light on Castaneda's plight and the lengths to which DIHS officers allegedly went to cover up their denial of care. The physician's assistant who cared for Castaneda, Anthony Walker, testified that he was confronted about Castaneda by petitioner Gonsalves. Dep. of Anthony Allen Walker, *Castaneda* v. *United States*,

No. CV 07-07241 (C.D. Cal. Sept. 5, 2008) ("Walker Dep.") at 93-94.[2] The following entry subsequently appeared on Castaneda's medical chart under Walker's name, though Walker testified that he entered the note at the direction of Gonsalves:

> I have been following this detainee and he DOES NOT have cancer at this time due to not having a biopsy performed and evaluated in a laboratory. There are some concerns that was explained to the patient by Dr. Wilkinson the oncologist but we are awaiting good communication between he and [another urologist] concerning the best direction, if any at all, with this patient. * * * Basically this p[atien]t needs to be patient and wait. [Another official] stated to me that he will tell the detainee to relax and be patient.

J.A. 133-134; Walker Dep. at 93-98.

In a subsequent entry, Walker wrote that Castaneda has been "counseled today concerning [a] grievance" Castaneda had filed against Hui for "not allowing him to be seen for his recent and ongoing complaint of a penile lesion." J.A. 136-137. Castaneda had become insistent with Hui that he was not receiving proper care. Walker Dep. at 83. The entry asserts that Castaneda "was not denied by Dr. Hui any treatment" and that there had been no "emergent need" for treatment. *Ibid.* Walker testified in his deposition that he wrote the entry on instructions from Hui:

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[2] An appellate court may take judicial notice of relevant developments in a case after the appeal has been filed. *E.g.*, *Bryant* v. *Carleson*, 444 F.2d 353, 357 (9th Cir. 1971).

> [Q.] Why did you then put this entry in the chart if you didn't see him?
>
> A. I was told to put it in.
>
> Q. Who told you to put it in?
>
> A. Dr. Hui told me to put it in.
>
> Q. How did that conversation come about?
>
> A. That she wanted something in the note or in the chart to document that she did not refuse him any treatment or any care concerning this complaint.
>
> * * *
>
> Q. Can you describe—can you recall the words that she used when she told you to do this?
>
> A. Just that—if I remember correctly—just that there needs to be something in the chart stating that I, being Dr. Hui, did not refuse him any care, because at this point he was complaining and putting in grievances stating that Dr. Hui has refused him and denied him due and just health care.

Walker Dep. 113-114. Yet Castaneda's condition had worsened well past the point where it should have been clear he needed more serious treatment. Walker recalled how the lesion looked on the same day Hui allegedly instructed him to enter the note:

> It was as if you had taken a mushroom, cut the stem off, and set the mushroom down and hit it with a hammer. That's what it looked like at this point, just kind of ballooned up, cracking, and bleeding. The drainage, the

> smell, kind of looking a little green now, just didn't look right at all.

Id. at 128-129.

Walker, who had arranged for Castaneda to see the oncologist who recommended "urgent" evaluation and treatment of Castaneda's lesion, also testified that Hui was displeased that he had gone behind her back:

> A. She was pretty salty, said that she was surprised in me, that she didn't think that I would do that, you know. But that it's not going to get done. He's not going to get admitted, and at this point it's probably just a wart, and—but if you want to pursue it and manage this patient, then manage him here in the clinic, and that's kind of how that went.
>
> * * *
>
> Q. So, in other words, she told you that he wasn't going to get an outside specialist to see him or perform surgery.
>
> A. Yes, sir.
>
> Q. That if there was anything that was to be done for him, it would have to be done in the clinic by you.
>
> A. Yes, sir.
>
> Q. A physician's assistant.
>
> A. Yes, sir.

Walker Dep. 76-77. But Walker, of course, had no capability to do a biopsy in the clinic. *Id.* at 77-78.

After the ACLU began advocating to DIHS officials on Castaneda's behalf, Castaneda was finally scheduled for a biopsy in February 2007. Pet. App. 7-8. However, a few days before the procedure, he was abruptly released from ICE custody; in effect, ICE washed its hands of any further responsibility for his care. Surgeons amputated Castaneda's penis, and he was diagnosed with squamous cell carcinoma. He endured multiple rounds of chemotherapy but died a year later on February 16, 2008 at the age of 36. *Id.* at 8.

SUMMARY OF ARGUMENT

The proper remedy for the constitutional violations in this case must come from an action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), not a mere tort claim governed by state law. The purpose of *Bivens* is to deter individual federal officers from violating the Constitution. This Court has explained that ordinary tort principles do not sufficiently protect constitutional rights or deter constitutional violations. Petitioners do not have the unique immunity they claim from *Bivens* actions, and they must be held accountable in the same way as other Government personnel who provide medical care in custodial settings.

This case is not an isolated example of cruelty, as documented by journalistic investigations and other pending cases brought by immigration detainees alleging unconstitutional denials of medical care. In addition to violations by individual officers, the problems plaguing the Nation's immigration detention centers result from policies that restrict care in ways that make them unconstitutional on their face. Thus, the threat of *Bivens* lawsuits also is necessary to

create pressure for reform from within and to force the Government to address a system that not only tolerates but encourages deliberate indifference to serious medical needs.

ARGUMENT

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that plaintiffs may recover damages for Fourth Amendment violations by Government officers. The Court later extended *Bivens* to Eighth Amendment violations when officers deliberately deny needed medical care to persons held in Government custody. *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980). The Court rejected the argument that such claims should be brought against the Government itself under the Federal Tort Claims Act ("FTCA"), rather than against individual officers under *Bivens*, explaining that Congress had not declared the FTCA a substitute for *Bivens* and that the FTCA "is not a sufficient protector of * * * constitutional rights." *Id.* at 23.

In this case, Castaneda's estate has sued the Government under the FTCA and individual defendants under *Bivens*. The Government has admitted FTCA liability for medical negligence. J.A. 328-339. But petitioners claim that as PHS personnel, they are uniquely immunized against *Bivens* claims by 42 U.S.C. § 233(a). Section 233(a), which was enacted as part of the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868, was added in response to a request by the Surgeon General that PHS personnel receive protection from ordinary malpractice liability. See Resp. Br. at 10 (describing legislative history). The district court and court of appeals, after painstaking statutory analysis, rejected

petitioners' argument that § 233(a) immunizes PHS personnel from *Bivens* actions. The court of appeals found that § 233(a) "stemmed from concerns over liability for unintentional malpractice, *not* from attempts to avoid responsibility for the kind of intentional torts that would support a constitutional violation." Pet. App. 78. For all the reasons set forth in respondents' brief, the analysis of the courts below was correct.

Amicus ACLU submits this brief to discuss an additional reason why the decisions below should be affirmed: the harm in this case implicates core constitutional principles that can be safeguarded only through a *Bivens* remedy. When PHS personnel violate the Constitution through deliberate indifference to the serious medical needs of detainees—and this case is one of many that indicate that such violations are all too common—they must be held accountable in the same way as other Government personnel who provide medical care in custodial settings.[3] Moreover, there is a strong argument that DIHS policy restricts medical care to a degree that makes the policy unconstitutional on its face. Only a *Bivens* remedy can provide the deterrence and incentive for

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[3] The Eighth Amendment applies to convicted prisoners. Castaneda was a civil, not criminal, detainee, and thus his constitutional rights are governed by the due process clause of the Fifth Amendment. A civil detainee's due process rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere* v. *Massachusetts Gen. Hosp.*, 463 U.S. 239, 244-45 (1983). The Ninth Circuit has held that conditions of confinement for civil detainees must be superior not only to those for convicted prisoners but also pretrial detainees. *Jones* v. *Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004).

greater oversight and reform that are necessary to help prevent future tragedies like the pain, suffering, and death of Francisco Castaneda.

I. *Bivens* Provides A Constitutional Remedy That An Ordinary Tort Claim Does Not Provide.

A. *Bivens*' Purpose Is To Deter Unconstitutional Conduct By Individual Government Officers.

"The purpose of *Bivens*," this Court has explained, "is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001). Such deterrence is grounded in the principle of individual accountability which is fundamental to our law. "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law[.] * * * 'All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.'" *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) (quoting *United States* v. *Lee*, 106 U.S. 196, 220 (1882)). See also *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401, 429 (1981) (Burger, C.J., dissenting) ("Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies."). Accordingly, this Court has not wavered from the principle that "the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity's policy." *Malesko*, 534 U.S. at 70 (discussing and citing *FDIC* v. *Meyer*, 510 U.S. 471 (1994)) (internal citations omitted).

In the context of medical care for persons held in Government custody, the Court has explained that *Bivens* is "a more effective deterrent" against unconstitutional conduct than the FTCA precisely "[b]ecause the *Bivens* remedy is recoverable against individuals. * * * It is almost axiomatic that the threat of damages has a deterrent effect." *Carlson*, 446 U.S. at 21. *Carlson* rejected the argument that FTCA liability is more likely than a *Bivens* action to cause the Government to "promulgate corrective policies." *Ibid.* Such an argument suggests "that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Ibid.* Since *Carlson*, the Court has consistently upheld individual *Bivens* liability for Eighth Amendment violations. See *Farmer* v. *Brennan*, 511 U.S. 825 (1994); *McCarthy* v. *Madigan*, 503 U.S. 140, 150-152 (1992); *Malesko*, 534 U.S. at 76 (Stevens, J., dissenting) ("We have never * * * qualified our holding that Eighth Amendment violations are actionable under *Bivens*.").

Thus, contrary to petitioners' suggestion, this case does not involve any extension of *Bivens* into a new context. Federal Bureau of Prisons medical personnel are subject to *Bivens* liability when they deny medical care in violation of the Constitution, and there is no persuasive argument for giving different treatment to PHS personnel who staff the Government's immigration detention facilities. Both provide care to persons whom the government has taken "into its custody" and who thus have no "freedom to act on [their] own behalf." *DeShaney* v. *Winnebago*

County Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989). And although both may be indemnified or provided insurance at the Government's discretion, that decision properly rests with Congress or the Executive; affirming the decisions below will create no new judicially imposed cost on the Government. In any event, this Court has explained that *Bivens* is intended to deter individual officers from violating constitutional rights "no matter that they * * * are indemnified by the employing agency." *Malesko*, 534 U.S. at 70.

Indeed, the Government agrees that *Bivens* deterrence is necessary to prevent Eighth Amendment violations in custodial settings. As the Government's attorney explained at oral argument in *Malesko*, "there is under *Bivens* no Nuremberg defense." *Malesko*, No. 00-860, Tr. of Oral Arg. at 23. He continued:

> [O]ne of the teachings of Bivens is that the responsibility for respecting constitutional rights is personal and individual, and therefore, liability for violating constitutional rights is also personal and individual. It illserves that notion of personal responsibility to shift the liability from * * * individuals who violate constitutional rights to some other source of money such as * * * the Government.

Id. at 23-24. See also *Malesko*, 534 U.S. at 70 (*Bivens* is intended to deter individuals "no matter that they * * * are acting pursuant to an entity's policy").

In short, "*Bivens* from its inception has been based * * * on the deterrence of individual officers who commit unconstitutional acts," deterrence that

"'would be lost'" if a *Bivens* remedy is unavailable. *Malesko*, 534 U.S. at 71. Petitioners would have this Court eviscerate that deterrent effect by immunizing PHS officers for constitutional violations, a request that should be rejected.

B. Only A Constitutional Tort Action Under *Bivens* Can Adequately Compensate Eighth Amendment Violations In Government Detention Facilities.

In addition to its deterrent effects, a *Bivens* action is necessary to effectively vindicate the Eighth Amendment's guarantee against cruel and unusual punishment and the Fifth Amendment's guarantee against mistreatment of civil detainees. The ordinary tort principles on which the FTCA is based are inadequate.

In the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("LRTCA"), Pub. L. No. 100-694, 102 Stat. 4563, Congress made the FTCA the exclusive remedy for personal injury or death "arising or resulting from the negligent or wrongful act or omission" of Government employees acting within the scope of their employment. See 28 U.S.C. § 2679(b)(1). In other words, in ordinary tort claims, the United States is substituted for the employee as the defendant. The LRTCA was intended to address liability for "common law torts." H.R. Rep. No. 100-700 (1988), 1988 U.S.C.C.A.N. 5945, 5947. As the courts below concluded after careful analysis, the LRTCA built upon the malpractice immunity Congress had previously given PHS personnel in § 233(a). But it is clear from the statutory text and legislative history that Congress never intended, either in § 233(a) or the LRTCA, to immunize PHS or other Government personnel for violations of consti-

tutional rights. Pet. App. 74-81. To the contrary, Congress acknowledged the "sharp distinction between common law torts and constitutional or *Bivens* torts," because the latter involves "a more serious intrusion of the rights of an individual that merits special attention." H.R. Rep. No. 100-700 (1988), 1988 U.S.C.C.A.N. 5945, 5950.

Under the FTCA, the Government may be held liable only "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Thus, were the FTCA the sole remedy in this case, it would mean as a practical matter that Castaneda's estate would be limited to a common-law malpractice action against the United States, an action that would be governed by the laws of California. See Pet. App. 18-19. (California, like many states, has been part of a tort-reform "revolution" in malpractice law; it caps such awards at $250,000. *Id.* at 18.) The action by the Castaneda estate for the cruel and unusual punishment he suffered in violation of the Constitution would simply fall away.

Such an outcome would flout Congressional intent, because a Government immigration detention facility obviously bears no resemblance to the typical doctor-patient setting. As the court of appeals observed, it would be outrageous to characterize Castaneda's suffering and death as a case of mere malpractice:

> Castaneda was not a walk-in patient at Defendants' clinic; neither are Defendants merely alleged to have misread a chart or fumbled a scalpel. The ordinary doctor, no matter how careless, does not hold her patients under lock and key, affirmatively preventing them from receiving the medical care

> they need and demand. * * * The Kafkaesque nightmare recounted in Plaintiffs' complaint, which we assume here to be true, draws its force not only from Defendants' alleged deliberate indifference, but also from Castaneda's *state-imposed helplessness* in the face of that indifference. The element of state coercion transforms this into a species of action categorically different from anything Congress would likely term "malpractice."

Pet. App. 26.

Indeed, at the core of *Bivens* is the principle that where a "federal agent unconstitutionally exercis[es] his authority," his relationship to the victim of that conduct is fundamentally different than the relationship between two private parties with which ordinary tort law is concerned. 403 U.S. at 391-392. "An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual [tortfeasor] exercising no authority other than his own." *Id.* at 392.

Accordingly, *Bivens* rejected the argument that that the plaintiff's remedy for a Fourth Amendment violation arises from state tort law rather than the Constitution. 403 U.S. at 394 (noting that state tort law might be "inconsistent or even hostile" to federal civil rights). See also Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1151 (1969) (state-law remedies "do[] not adequately protect the federal interest against possibly aberrational state policies that limit or defeat the cause of action, such as a restrictive measure of damages"). The *Bivens* holding was consistent with the Court's view that where a constitutional violation is concerned, "[i]t is no answer that the State has a law which if enforced

would give relief." *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961). The "limitations on state remedies for violation of common-law rights by private citizens," such as caps on damage awards and other restrictions embodied in state malpractice law, "argue in favor of a federal damages remedy" under the Constitution, because "[t]he injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind." *Bivens*, 403 U.S. at 409 (Harlan, J., concurring in the judgment).

Thus, contrary to petitioners' argument, a victim of unconstitutional behavior "for which the moniker 'cruel' is inadequate," Pet. App. 88, should not be relegated to an FTCA claim that is governed by ordinary tort law. Federal courts hearing cases like Castaneda's should not be required to "search[] for a state cause of action into which they can shoehorn a constitutional claim." John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 759-760 (2008). Just as "the Fourth Amendment is not tied to the niceties of local trespass laws," *Bivens*, 403 U.S. at 393-394, remedies for violation of the Eighth Amendment's prohibition against cruel and unusual punishment must not be left to the niceties of state malpractice law. As the Court said in *Carlson*, "The question whether [an] action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution." 446 U.S. at 23. The "liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" and "'should not depend upon where the violation occurred.'" *Id.* at 23-24.

C. There Is No Basis For Granting PHS Personnel Unique Immunity From Constitutional Claims.

Because other Government medical personnel are immunized only for negligent acts, immunizing PHS personnel from constitutional torts would give them "the privilege, shared with no other federal employees, to violate the Constitution without consequence." Pet. App. 36. This anomaly further demonstrates why petitioners' interpretation of § 233(a) is erroneous and must be rejected. As the court of appeals asked, "Why distinguish the Bureau of Prisons medical personnel who allowed a man in federal custody to die in *Carlson* from the PHS personnel who allegedly relegated a man in immigration detention to a similar outcome here?" *Id.* at 37. Congress could not have intended such a result, because "the LRTCA was passed to abolish such arbitrary distinctions." *Ibid.*

The concern about differing liability for different Government personnel is not merely speculative. Several district courts, relying on the same erroneous interpretation of § 233(a) that petitioners advance here, have dismissed claims against PHS officers while letting them proceed against non-PHS defendants, even though the PHS and non-PHS personnel worked side-by-side and were part of the same alleged unconstitutional conduct.

For example, in *Stine* v. *Fetterhoff*, a federal penitentiary inmate brought a *Bivens* action after medical personnel failed to properly treat an exposed jawbone that eventually became infected and caused severe pain. 2008 WL 4330572, *4-*5 (D. Colo. 2008). Based on its interpretation of § 233(a), the district court dismissed a PHS dentist from the suit but al-

lowed claims to proceed against the clinic director and warden. *Id.* at *8, *12. See also *Custard* v. *Young*, 2008 WL 791954 (D. Colo. 2008) (dismissing PHS employee but allowing suit to go forward against other defendants); *Freeman* v. *Inch*, 2005 WL 1154407 (M.D. Pa. 2005) (dismissing claim against PHS physician's assistant).

This Court has "[n]ever suggested that a category of federal agents can commit Eighth Amendment violations with impunity." *Malesko*, 534 U.S. at 76 (Stevens, J., dissenting). Accordingly, it should end, not endorse, such absurd and unfair distinctions among Government personnel who provide the same care in the same custodial settings.

D. For Additional Reasons Discussed In *Carlson*, An FTCA Remedy Is Inadquate To Deter Constitutional Violations By PHS Personnel.

In addition to the fact that a *Bivens* remedy provides a more powerful deterrent effect because it is grounded in constitutional principles and is directed to individuals, *Carlson* enumerated other reasons why an FTCA claim against the Government is not an effective remedy for constitutional violations. See 446 U.S. at 20. Those considerations apply to this case with full force.

For example, an FTCA plaintiff, unlike a *Bivens* plaintiff, cannot seek punitive damages, which are statutorily prohibited under the FTCA. 28 U.S.C. § 2674. Yet punitive damages "are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." *Carlson*, 446 U.S. at 22. Moreover, punitive damages are available in § 1983 actions against state officials, and "the

'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression." *Ibid.* See also Hill, *Constitutional Remedies*, at 1153 ("[T]he protective provisions of the Constitution, insofar as they apply both to the federal and state governments, are entitled to equally effective implementation on the federal and state levels."). Punitive damages are especially warranted in this case, which involves conduct the district court said "transcends negligence by miles" and presents "one of the most, if not the most, egregious Eighth Amendment violations the Court has ever encountered." Pet. App. 82.

An FTCA plaintiff also may not seek a jury trial, 28 U.S.C. § 2402, as he may in a *Bivens* suit. Yet a person alleging violation of constitutional rights must "retain the choice" to have his case heard by a jury. *Carlson*, 446 U.S. at 23. A jury should be allowed to determine the just compensation for Castaneda's unconstitutional suffering and wrongful death.[4]

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[4] The FTCA also includes certain exceptions that prevent recovery for the Government's torts, such as where an injury is sustained abroad, and this Court has held that in such circumstances officials retain individual immunity under the LRTCA as well. *United States* v. *Smith*, 499 U.S. 160, 165 (1991). This means that without a *Bivens* action, some plaintiffs suing PHS personnel might have no possibility of recovery at all. Indeed, in *Smith* (which involved a suit against a military physician), the Court noted that *Bivens* actions allowed the possibility of recovery even where no FTCA suit was available against either the Government or the individual official. *Id.* at 166-167. Accord Hearings on H.R. 4358 et al. before the

In summary, only a constitutional remedy can adequately deter unconstitutional conduct and properly compensate victims like Francisco Castaneda. The FTCA "is not a sufficient protector of * * * constitutional rights," *Carlson*, 446 U.S. at 23. This Court should reject petitioners' claim to unique immunity from constitutional violations that would leave victims like Castaneda and their families with nothing more than an ordinary malpractice suit.

II. Serious Constitutional Violations Documented In Other Cases Further Demonstrate The Need For A *Bivens* Remedy.

Castaneda's mistreatment was not an isolated example of deliberate indifference by DIHS personnel. Other cases currently pending in federal courts, including a class action brought by the ACLU (see Statement of Interest at 1, *supra*), allege clear constitutional violations that cannot be adequately deterred or remedied with simple negligence-based tort actions. They further illustrate why this Court should reject petitioners' arguments for unique immunity from *Bivens* claims.

The grave problems plaguing immigration detention centers have begun to draw public scrutiny. An extensive investigation by the *Washington Post* found that immigration detainees too often suffer "shabby medical care within an

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Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 100th Cong., 2d Sess., 78 (1988) ("Persons alleging constitutional torts will, under [the LRTCA], remain free to pursue a remedy against the individual employee if they so choose.").

unseen network of special prisons" where they are "locked in a world of slow care, poor care and no care, with panic and coverups among employees watching it happen." Dana Priest & Amy Goldstein, *System of Neglect*, WASH. POST, May 11, 2008, at A1. According to the *Post*, in the five years preceding its investigation 83 detainees had "died in, or soon after, custody." *Ibid.* "Actions taken—or not taken—by medical staff members may have contributed to 30 of those deaths." *Ibid.* A similar report in the *New York Times* revealed that "[n]o government body is charged with accounting for deaths in immigration detention," which is "the United States' fastest-growing form of incarceration." Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES, June 26, 2007, at A1.

A more recent report in the *Times*, based on documents obtained by that paper and the ACLU, found that 107 detainees have died in ICE custody since October 2003. Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, at A1. According to the *Times*, "the documents show how officials—some still in key positions—used their role as overseers to cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse." *Ibid.*

The following examples show that Castaneda's plight, although extreme, was by no means an isolated case.

Martin Hernandez-Banderas

Martin Hernandez-Banderas arrived at the ICE San Diego facility as an immigration detainee in October 2006. In December 2006, he was brought to the

facility's medical center in a wheelchair, complaining of severe pain in his right ankle. A nurse documented that his ankle was red, hot, swollen, and tender. Physician assistant Walker (the same physician assistant who treated Castaneda) documented that the foot and ankle were oozing pus, the ankle was painful, and the foot was numb. Compl., *Hernandez-Banderas* v. *United States, et al.*, No. CV 08-06594 (C.D. Cal. Oct. 7, 2008) ("*Hernandez-Banderas* Compl."), ¶¶ 16-17.

Hernandez-Banderas was then seen by petitioner Hui, who documented that an ulcer on his toe had spread to his ankle and burst. Hui recommended that dead skin tissue be removed; the area was incised with a scalpel, pus was removed, and the wound was bandaged. *Hernandez-Banderas* Compl. ¶ 18. Walker diagnosed Hernandez-Banderas with cellulitis (a spreading inflammation of human tissue), diabetes mellitus, and mild gangrene to the big toe. On December 12, Hernandez-Banderas's blood sugar level was 298 mg/dl, an extremely high and abnormal reading, and DIHS administered insulin. *Id.* ¶¶ 19-20.

On December 13, DIHS documented that Hernandez-Banderas had swelling, pain, and tenderness on his right foot, abnormally high blood sugar, and a 103-degree fever. On the same day, Hui documented that he had poor pulses in his right foot, drainage of the wound, and pain. She removed more dead tissue from his leg. *Hernandez-Banderas* Compl. ¶ 21. Hui examined him again on December 26 and documented that the dead skin tissue had extended from a 1 cm. area on the ankle to "mid shin" and was swollen. She also noted that he had an open bloody wound with some layers of soft dead tissue. Another

record from December 26 documented that Hernandez-Banderas's blood sugar level was 303 mg/dl, an extremely high and abnormal level. Insulin was ordered again. *Id.* ¶ 38.

Despite the fact that Hui had actual knowledge that Hernandez-Banderas was a newly diagnosed diabetic, his blood sugar levels were abnormally high and uncontrolled by insulin, he could no longer walk and was confined to a wheelchair, and his leg was deteriorating and dying, Hui failed to refer him to a diabetic wound specialist to treat his obviously serious condition. *Hernandez-Banderas* Compl. ¶ 39.

Ultimately Hernandez-Banderas was taken to an offsite hospital, where he remained for over a month, at which point he was released from ICE custody, thus ending the Government's responsibility to pay for his care. *Hernandez-Banderas* Compl. ¶ 59. He suffered permanent physical deformity and impairment, including a recommendation to amputate his leg due to severe tissue death. *Id.* ¶ 1. Hernandez-Banderas alleges that Hui intentionally misrepresented his condition and treatment in medical records to downplay its seriousness and protect herself from liability. *Id.* ¶ 54. The *Washington Post* investigation revealed that an internal review had concluded that DIHS medical personnel "did not appreciate the severity of [Hernandez-Banderas's] diabetic foot wounds, did not properly treat them or prescribe the correct course of antibiotics, and did not bring in a qualified surgeon to evaluate the problem." Priest & Goldstein, *System of Neglect*.

Winston Carcamo

Prior to his detention at the ICE San Diego facility, Winston Carcamo suffered an injury that re-

quired removal of his right eye. At the time of the surgery, he was told he needed a prosthetic eye implant both to preserve the physical integrity of the eye socket and to prevent the spread of infection. Upon arriving at the ICE facility, Carcamo asked for an eye prosthesis and offered to have his family pay for the procedure. The procedure was delayed for more than six months, purportedly because the injury "didn't happen here" and DIHS policy did not cover "elective or pre-existing conditions." By the time the procedure finally occurred, it caused Carcamo severe pain because his bones had shifted and the eye socket had already begun to close. Compl., *Woods* v. *Myers*, No. 3:07-cv-1078 (S.D. Cal. June 13, 2007) ("*Woods* Compl."), ¶¶ 91-94.

Jose Arias Forero

Jose Arias Forero suffered a serious shoulder injury and complained of severe pain in his right arm and shoulder, but medical personnel at the San Diego ICE facility told him there was nothing wrong and that he was faking the pain. When Forero finally received an MRI, it revealed a complete tear of his right rotator cuff. Forrero did not receive surgery for the injury until approximately eight months after his arrival. Doctors' orders that Forero receive follow-up care and physical therapy were ignored, and he suffered a complete reinjury when an officer used excessive force. Forero did not receive an MRI of the new injury for approximately four months, and at one point was turned away because no prescription for the MRI contrast medication had been ordered. *Woods* Compl. ¶¶ 80-83.

These cases and others demonstrate that the deliberate indifference and unconstitutional suffering that Castaneda endured were not an isolated prob-

lem. The allegations in these cases go far beyond the sort of negligent malpractice that the FTCA was intended to compensate. Without a *Bivens* remedy, victims and their families will have no cause of action available to address such cruel conduct.

III. Bivens Liability Also Will Generate Pressure From Within DIHS To Reform Policies That Unconstitutionally Restrict Detainee Medical Care.

In addition to unconstitutional denials of treatment committed by individual officers, the serious problems of immigration detainee medical care also result from DIHS policies that restrict diagnosis and treatment in ways that make them unconstitutional on their face. Indeed, in this case petitioners repeatedly blamed their failure to properly treat Castaneda on DIHS policy against paying for "elective" care. See, *e.g.*, Pet. App. 6; J.A. 125. This Court has made clear that *Bivens* is intended to deter Government officers from violating the Constitution "no matter that they * * * are acting pursuant to an entity's policy." *Malesko*, 534 U.S. at 70. But to the extent that DIHS policy encourages constitutional violations, the threat of *Bivens* lawsuits against individual officials is necessary to create pressure for reform from within DIHS, as well as to spur appropriate Government officials to address the matter.

"[W]hen the State takes a person into its custody and holds him there against his will," this Court has explained, "the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200. "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle* v.

Gamble, 429 U.S. 97, 103 (1976). This "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200.

For prison inmates, the Constitution is violated when officials manifest "deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 104. Specifically, officials are liable if they ignore an "excessive risk to inmate health or safety" or a "risk of serious damage to his future health." *Farmer*, 511 U.S. at 837, 843.

Immigration detainees held by ICE are no less in the Government's custody than federal prison inmates, and they have no greater ability to arrange their own medical care or "act on [their] own behalf." *DeShaney*, 489 U.S. at 200. Yet under DIHS policy, medical treatment is restricted to "emergency care" and medical conditions that "would cause deterioration of the detainee's health or uncontrolled suffering *affecting his/her deportation status*." DIHS Covered Services Package, J.A. 194 (emphasis added). In other words, DIHS only recognizes a need to keep a detainee minimally healthy enough to be deported or otherwise released.

This policy cannot be reconciled with this Court's holdings that Government officials must treat *any* medical condition that poses "excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. The Eighth Amendment applies not just to immediate health problems but also to the "*future harm*" a detainee may suffer from his condition. *Helling* v. *McKinney*, 509 U.S. 25, 33 (1993) (emphasis added). "We have great difficulty agreeing that prison au-

thorities may not be deliberately indifferent to an inmate's current health problems but may ignore" a medical problem "that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Ibid.* A "life-threatening condition * * * need not await a tragic event." *Ibid.* See also *McKenna* v. *Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (no qualified immunity for defendants who were claimed to have denied treatment for Hepatitis C because prisoner might be released within a year). Nor can a desire to limit the cost of medical care justify failure to address a serious medical need. *Jones* v. *Johnson*, 781 F.2d 761, 771 (9th Cir. 1986). In short, the standard of care imposed by the Eighth Amendment is not limited to emergency care or to treatment that merely keeps a detainee alive until he is no longer the Government's problem.

Bivens liability is necessary in this context because, in addition to deterring individual constitutional violations, it will spur PHS personnel to apply pressure within the system to reform DIHS's unconstitutional policy. As the *Washington Post* documented, petitioner Hui in 2008 "sent a memo to DIHS medical director Timothy T. Shack, saying her colleagues were worried that they might be sued because of the substandard care they were giving detainees." Priest & Goldstein, *System of Neglect*. "The agency's mission of 'keeping the detainee medically ready for deportation' often conflicts with the standards of care in the wider medical community, Hui wrote." *Ibid.* Hui confirmed in a deposition taken for the *Banderas* case that the DIHS policy was "a concern of some physicians working at DIHS." Dep. of Esther Hui, *Banderas* v. *United States*, No. CV 08-06594 (C.D. Cal. June 10, 2009), at 21-22. The *Post* investigation also revealed that in an internal review

of another detainee death, when asked whether the patient had received "appropriate and adequate health care consistent with community standards," Hui checked "No." Priest & Goldstein, *System of Neglect*.

PHS personnel typically are indemnified by the Government when they are sued in their individual capacities under *Bivens* (a choice that is entirely within the Government's discretion) and damage awards in *Bivens* cases can be substantially larger than awards under the FTCA. The pressure of increased monetary judgments, along with the adverse publicity generated by constitutional lawsuits, will help force reform in a system that is plagued by "flawed medical judgments, faulty administrative practices, neglectful guards, ill-trained technicians, sloppy record-keeping, lost medical files and dangerous staff shortages." Priest & Goldstein, *System of Neglect*. Indeed, the *New York Times* recently reported that the Government "has vowed to overhaul immigration detention" and is "mov[ing] to increase oversight" of ICE. Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*.

In summary, the responsibility to prevent constitutional violations and reform the shocking conditions in our Nation's immigration detention facilities lies both with the individual personnel who work in those facilities and with the Government officials charged with making policy. The continued availability of *Bivens* actions will encourage the execution of that responsibility in ways that are entirely consistent with this Court's decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,

Petitioners,

vs.

YANIRA CASTANEDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES PUBLIC HEALTH SERVICE, INC., THE UNIFORMED SERVICES ACADEMY OF FAMILY PHYSICIANS, INC., AMERICAN MEDICAL ASSOCIATION, AND AMERICAN ACADEMY OF FAMILY PHYSICIANS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does 42 U.S.C. § 233(a) make the Federal Tort Claims Act the exclusive remedy for claims arising from medical care and related functions provided by Public Health Service personnel, thus barring *Bivens* actions?

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INTEREST OF *AMICI CURIAE*

Amicus the Commissioned Officers Association of the United States Public Health Service, Inc. ("COAUSPHS") is a member-based association comprised of approximately 6,500 active duty, inactive reserve and retired commissioned officers of the United States Public Health Service ("USPHS").[1] Formed in 1950, COAUSPHS is the sole organization that works exclusively for the benefit of commissioned officers of the USPHS. In addition, COAUSPHS has 82 local branches located throughout the United States, and international branches in Europe and Asia. These local branches act as local sources of information, education, training, community service, support, networking and social activity for members. The core of COAUSPHS's members are Commissioned Corps Officers of the USPHS. Led by the Surgeon General, the USPHS Commissioned Corps is one of the seven Uniformed Services, whose officers serve the 10 agencies within the Department of Health and Human Services (including the Centers for Disease Control, the Food and Drug Administration, the Indian Health Service and the National Institutes of Health). *See* 10 U.S.C. § 101(a)(5)(C); 42 U.S.C. § 201(p). USPHS

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. The parties have consented to the filing of this brief, and the consent letters are being lodged with the Court. Pursuant to Rule 37.6, no party authored this brief in whole or in part and no person other than *amici* or their counsel contributed money to the preparation or submission of this brief.

officers also serve other federal agencies, including the Department of Defense, Environmental Protection Agency, U.S. Citizenship and Immigration Services, Federal Bureau of Prisons, Coast Guard and Department of Agriculture.

Amicus The Uniformed Services Academy of Family Physicians, Inc. ("USAFP") is a member-based association comprised of approximately 2,400 active duty military personnel, approximately 1,700 of whom are practicing family physicians. The USAFP was formed in 1972 to encourage and better the practice of family medicine in the military and other Uniformed Services.

Amicus the American Medical Association ("AMA") is a private, voluntary non-profit organization of physicians. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its objects today. It is the largest association of physicians and medical students in the United States, and its members practice in every state and in all fields of medical specialization.

Amicus the American Academy of Family Physicians ("AAFP") is a private, voluntary non-profit organization of physicians, with a membership of 94,600 family physicians and medical students. Included among the AAFP's objects and purposes are to preserve and promote quality, cost-effective health care, and to provide advocacy for and education of its

members, their patients and the public in all health related matters.

Together, the *amici* aim to improve and protect the public health of the United States through comprehensive member services, advocacy for their respective members and for public health generally, conducting educational and training events, performing studies and research useful to health professionals, and disseminating public and professional information of interest and use to health professionals. In addition, the *amici* closely monitor legal and political issues that affect public health, and often offer their perspective when such issues arise.

The issue presented by the ruling below is of great importance to the many physicians and other health care providers represented by the *amici*, and to the patients they serve. This case will profoundly affect the ability of the USPHS to recruit and retain medical professionals, and impact the mobility of public health officers who must be deployed expeditiously throughout the country as local and regional events and circumstances demand. Accordingly, the *amici* wish to assist the Court properly to resolve the issue presented.

STATEMENT

Amici adopt the statement of the case as set forth by the petitioners in their briefs in this Court.

SUMMARY OF ARGUMENT

USPHS commissioned officers and personnel provide health care to underserved communities, immigration detainees, Native Americans, Alaska Natives, and the Coast Guard. They are deployed throughout the country, and internationally, as circumstances and needs dictate. USPHS officers are paid substantially less than equivalent health care providers in the private sector. However, these officers have not, until this case, been burdened with the need for malpractice insurance. The personal immunity that such health care providers have heretofore enjoyed is essential to the recruitment and retention of qualified professionals who provide services in sub-optimal conditions, for relatively low pay.

In addition, the mission of the USPHS depends upon the ability to rapidly deploy its personnel to locations where services may be needed as a result of a natural disaster, outbreak of disease or other emergent circumstances. The potential exposure of such personnel to individual liability arising out of their medical services profoundly affects the mobility of USPHS personnel and their ability to deploy to

areas and facilities where there exists an acute, urgent need for health care services.

ARGUMENT

I. SUBJECTING USPHS PERSONNEL TO *BIVENS* ACTIONS WILL ADVERSELY AFFECT THE ABILITY OF THE USPHS TO FULFILL ITS MANDATE AND TO RECRUIT AND RETAIN QUALIFIED PERSONNEL TO PROVIDE HEALTH CARE SERVICES

The legislation containing § 233(a) sought to permit the USPHS to provide health care to underserved communities and areas. *See* Emergency Health Personnel Act of 1970, Pub. L. 91-623, 84 Stat. 1868, 1870 (1970); *see also* H. Rep. No. 91-1662, 91st Cong., 2d Sess. at 1, reprinted in 1970 U.S.C.C.A.N. 5775. However, because USPHS officers were not paid enough to afford individual malpractice insurance, the Surgeon General requested an amendment to protect USPHS officers from suits for damages arising out of the health care they provide. *See* 116 Cong. Rec. 42542 (1970) (Rep. Staggers, the bill's sponsor); *see also* 116 Cong. Rec. 42977 (1970) (Sen. Javits). Congress' very purpose in enacting § 233(a) was to provide immunity from personal liability and the burdens of defending lawsuits to practitioners who provide health care services to underserved communities

and receive substantially less financial remuneration than their private-sector counterparts.[2]

The Surgeon General's and Congress' concerns regarding the "pay gap" between the Uniformed Services and the private sector were well-founded. *See* Military Pay Comparability Act of 2003, H.R. 1885, 108th Cong., 1st Sess., § 2 (citing a pay gap of 13.5% between uniformed personnel and private sector employees in 1999). This differential makes personal malpractice insurance prohibitively expensive for medical professionals in the Uniformed Services, and was one of the principal reasons Congress enacted § 233(a). The ruling below, however, would subject USPHS personnel to medical malpractice actions couched as *Bivens* claims. The attendant need for malpractice insurance, at great cost, together with the ever-present threat of being subjected to litigation, will undoubtedly harm the USPHS's ability to recruit and retain qualified medical personnel.

Equally troubling is that USPHS personnel, unlike their private sector counterparts, are exposed to constitutional tort claims. Obtaining insurance

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[2] While the legislative history of § 233(a) supports the petitioner's position, resort to such history is unnecessary, as the plain language of the statute requires a determination that the Ninth Circuit erred. "[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)).

coverage that extends beyond the ordinary scope of professional liability policies – to include protection against constitutional tort claims – would necessarily be more expensive than standard coverage, if it could be obtained at all. Thus, the net effect of the ruling below is to cause the lowest-paid physicians and medical personnel, who are engaged in public service, to incur the highest costs to protect themselves against professional liability claims. The ruling below also provides a back-door route for plaintiffs to press malpractice claims, and creates an uninsurable constitutional tort liability for services provided under emergent conditions – circumstances of already-heightened stress. The ruling below creates multiple liability traps for services delivered in theaters most likely to give rise to risk, and imposes them upon health care providers who can least afford to insure against them. Perversely, it risks degrading the ability of the USPHS to respond in times and circumstances when it is most desperately needed. As a result, underserved communities, those with the greatest need for medical care and services, will suffer.

II. THE RULING BELOW WILL SEVERELY UNDERMINE THE ABILITY OF THE USPHS TO PROVIDE HEALTH CARE SERVICES TO THOSE IN NEED IN THE EVENT OF A NATURAL DISASTER OR OTHER EMERGENT CIRCUMSTANCES

Public health threats and medical emergencies ensue from many causes, including natural epidemics of infectious disease; terrorist acts involving explosives, biological agents, toxic chemicals, radiological or nuclear devices; industrial or transportation accidents; and weather-related catastrophes. *See* U.S. Dep't of Health & Human Svcs. Concept of Operations Plan (CONOPS) for Public Heath & Medical Emergencies, at 9 (May 2004). In exigent circumstances, USPHS deploys its personnel to areas in need of services, which may be deemed "health professional shortage areas." *See* 42 U.S.C. § 254e(a).

By way of example, in 2005, Hurricanes Katrina and Rita devastated the Gulf Coast. On August 29, Hurricane Katrina made landfall in Louisiana as a Category 3 storm, causing an estimated $81 billion in damage and 1,833 deaths. National Hurricane Center, "Tropical Cyclone Report, Hurricane Katrina, 23-30 August 2005" (available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf) (last accessed December 4, 2009). On September 24, Hurricane Rita made landfall between Texas and Louisiana, also as a Category 3 storm, causing estimated total damage of $10 billion and at least 62 deaths. National Hurricane Center, "Tropical Cyclone Report, Hurricane

Rita, 18-26 September 2005" (available at http://www.nhc.noaa.gov/pdf/TCR-AL182005_Rita.pdf) (last accessed December 4, 2009).

In response to health care and public health needs in the areas affected by the hurricanes, the USPHS carried out the largest deployment in its history. *See* Dep't of Health & Human Svcs., Office of the Inspector General, "The Commissioned Corps' Response to Hurricanes Katrina and Rita," (February 2007). Of the 6,122 Corps officers on active duty between August 26 and November 7, 2005, 2,199 (or 35%) deployed at least once in response to the hurricanes. *Id.* These officers served a total of 2,372 missions, with some officers deploying more than once. *Id.* The USPHS Commissioned Corps was instrumental in delivering needed health services in the wake of these natural disasters. To provide these services, the USPHS had to rapidly deploy officers and other personnel to locations where the population most needed them.

The threat of being subjected to *Bivens* claims against USPHS personnel has a real and substantial impact upon the USPHS's ability to rapidly deploy officers when natural or other disasters, like the Gulf Coast hurricanes, strike. This threat will also discourage USPHS personnel from agreeing to work in the facilities in which their work is critical – immigration detention facilities, federal prisons and the like – but where they are more likely to face constitutional tort claims. The ruling below therefore impairs the ability of uninsured USPHS personnel to rapidly deploy to areas and facilities where insurance

against constitutional tort claims would be prudent, if not necessary. For instance, should a large influenza outbreak occur in a detention facility, USPHS officers located elsewhere, in non-custodial settings, would understandably and justifiably be hesitant to deploy to the detention facility, given the personal liability risks they might incur.

The ruling below creates an untenable situation which undermines the ability of USPHS personnel to serve communities and facilities in need throughout the nation, particularly in circumstances where rapid, large scale deployment of officers is required, as with infectious disease pandemics, natural disasters or a major terrorism incident. The ruling below impairs the ability of the USPHS to fulfill its mission of providing health care to those most in need.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,

Petitioners,

v.

YANIRA CASTANEDA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* REP. JOHN CONYERS, JR., REP. ZOE LOFGREN, AND REP. JERROLD NADLER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The question presented is whether any remedy exists against officers of the Public Health Service (PHS) who are deliberately indifferent to the serious medical needs of persons in federal custody – just as such a remedy is available for identical, unconstitutional conduct committed by other, similarly situated federal employees?

This brief is submitted on behalf of Rep. John Conyers, Jr. (D-MI), Chairman of the Committee on the Judiciary, U.S. House of Representatives, Rep. Zoe Lofgren (D-CA), Chairwoman of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, and Rep. Jerrold Nadler (D-NY), Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary.[1]

Amici curiae are Members of Congress with an important interest in the question presented by this case. The Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law has held hearings on serious problems with the provision of medical care at immigration detention facilities across the country supervised by the U.S. Immigration and Customs Enforcement (ICE), a federal agency within the

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[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

Department of Homeland Security.[2] This deficient care has led to fatalities, including the death of Francisco Castaneda, which forms the basis of the claims in this case. According to the district court below, "Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate." *Castaneda v. United States*, 538 F. Supp. 2d 1279, 1298 n.16 (C.D. Cal. 2008). Mr. Castaneda testified before the House Immigration Subcommittee on October 4, 2007, only a few months prior to his death. ICE figures show that 107 persons have died in detention since October 2003.

Numerous internal documents and reports of government whistleblowers confirm that government officers and employees have repeatedly delayed or denied necessary treatment, apparently in an ill-conceived effort to cut costs. The record assembled by the Subcommittee and investigative journalists details denials of treatment for tuberculosis, pneumonia, bone fractures, head trauma, chest pain, and other serious complaints. At one facility in San Pedro, California, the clinical director prohibited

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[2] *See Problems with Immigration Detainee Medical Care: Hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, U.S. House of Representatives*, 110th Cong., 2d Sess. (June 4, 2008) (Serial No. 110-117) ("June 4, 2008 Hearing"); *Detention and Removal: Immigration Detainee Medical Care: Hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, U.S. House of Representatives*, 110th Cong., 1st Sess. (Oct. 4, 2007) (Serial No. 110-53) ("October 4, 2007 Hearing").

medical staff from ordering any lab work for detainees no matter what their condition until they had been detained for more than 30 days. An internal Public Health Service document indicates that this policy may have played a role in the death of a detainee with AIDS who was denied proper medication through her period of detention. After reviewing thousands of government records pertaining to detainee deaths, the New York Times recently reported that officials "used their role as overseers to cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse."[3]

In short, the public record demonstrates the importance of relief for violations of constitutional rights, where appropriate. *Amici* also have an important interest in the proper interpretation of the governing statutory framework. At bottom, this case presents a question of congressional intent regarding the Emergency Health Personnel Act of 1970 and the Westfall Act of 1988. *Amici* are uniquely situated to address this question of congressional intent. Although *amici* submit this brief in their individual capacities, not on behalf of Congress itself, their views are informed by their experiences as Members of Congress.

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[3] *Officials Obscured Truth Of Migrant Deaths in Jail*, N.Y. Times, Jan. 10, 2010, at 1.

SUMMARY OF ARGUMENT

This brief is filed by the current Chairman of the Committee on the Judiciary, the Chairwoman of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, and the Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary. *Amici* urge the Court to affirm the judgment of the Court of Appeals.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a right of action for damages against individual federal officials for constitutional violations. In *Carlson v. Green*, 446 U.S. 14 (1980), the Court held that a *Bivens* remedy was available against federal medical personnel who were deliberately indifferent to the serious medical needs of a prisoner in federal custody. There is no basis for creating a new and different rule for PHS officers and employees. Indeed, the facts of this case are remarkably similar to those of *Carlson*. Although the *Carlson* Court did not squarely decide the question presented here, the defendants in *Carlson* included the Assistant Surgeon General of the United States, a member of the PHS.

This case involves two federal statutes. Section 233(a) of Title 42 provides that the remedy against the United States provided by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2672, with respect to personal injuries, including death, resulting from medical care or related functions performed by "any commissioned officer or employee of the Public Health Service while acting within the scope of his

office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee." This language, enacted in 1970 prior to the decision in *Bivens*, was limited to common-law and statutory malpractice claims and did not – and logically could not – include constitutional claims.

In addition, Section 233(a) must be interpreted in the context of the FTCA as amended by Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4563, enacted in response to this Court's decision in *Westfall v. Erwin,* 484 U.S. 292 (1988). The Westfall Act makes clear that the exclusive remedy provision of the Federal Tort Claims Act "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The Westfall Act thus expressly preserves the right of injured plaintiffs to bring civil actions "for a violation of the Constitution of the United States" – i.e., *Bivens* claims.

Section 233(a) refers expressly to FTCA provisions and relies on them for its operation. Section 233(a) makes the FTCA the exclusive remedy for claims against PHS personnel only to the extent the FTCA so provides. And the FTCA does not include immunity for constitutional claims – in fact, it explicitly preserves *Bivens* claims.

Further, other provisions in Section 233, including Sections 233(c), 233(e), and 233(f), underscore the relationship between the Public Health Service Act and the FTCA. These provisions

confirm Congress' understanding that the scope of the immunity in Section 233(a) must be interpreted according to the scope of the remedy provided in the FTCA. The *Bivens* exception of the FTCA applies to Section 233.

The need for a *Bivens* remedy in this context is clear. Congress has held hearings documenting the serious problems with detainee medical care and the all-too-frequent unsafe and inhumane treatment. Detainees have been denied access to life-saving surgical procedures and medications. Given their confinement, people in ICE facilities have no other health treatment options, and the federal government has a constitutional duty to provide a minimum standard of medical care. Despite that duty, federal officers have sometimes ignored or delayed treatment for health problems up to and including emergencies. Mistreatment or lack of treatment while in ICE facilities has resulted in avoidable suffering and numerous deaths, reports of which might even be understated because of improper reporting.

Amici have no doubts that the vast majority of PHS personnel are dedicated and conscientious public servants. They have nothing to fear from potential *Bivens* liability, which arises only in extraordinary situations involving constitutional violations. Where such tragedies occur, a constitutional tort remedy should be available against PHS personnel, on the same terms and conditions as it is available against other federal officers mandated to provide medical care to persons in custody.

For all these reasons, this Court should affirm the judgment of the Court of Appeals.

ARGUMENT

I. CONGRESS HAS MADE CLEAR ITS INTENT TO PRESERVE A *BIVENS* REMEDY AGAINST PHS PERSONNEL.

A. *Carlson v. Green* Makes Clear That The Availability Of An FTCA Claim Does Not Preclude A *Bivens* Remedy.

This Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), provides the analytical framework to resolve the question presented. In *Carlson*, this Court upheld the availability of a *Bivens* remedy against federal medical personnel who allowed a man in federal custody to die, and it compels the recognition of the continued availability of a *Bivens* claim against the PHS personnel who allegedly relegated a man in immigration detention to a similar outcome here.

The facts of *Carlson* bear an uncanny resemblance to those of the instant case. In *Carlson*, the plaintiff was the mother of a deceased federal prisoner, who brought suit against federal officers and employees on behalf of her son's estate, alleging Eighth Amendment violations. She claimed that federal officials' deliberate indifference to his serious medical needs amounted to an Eighth Amendment violation and caused her son, a chronic asthmatic, to die of respiratory failure. 446 U.S. at 16 & n.1. The defendants in *Carlson* included the Assistant Surgeon General of the United States, a member of the PHS, as well as employees of the Bureau of Prisons. The defendants contended that the FTCA provided substitute relief that displaced a *Bivens* remedy.

This Court rejected the defendants' contention. *Id.* at 19. First, the Court held that "the case involve[d] no special factors counseling hesitation." *Id.* Second, the Court found that there was no congressional declaration foreclosing the *Bivens* claim and making the FTCA exclusive. No statute declared the FTCA to be a substitute for *Bivens*, and subsequent legislative history "made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action." *Id.* at 20. The Court held that the potential for a recovery of damages from the government pursuant to the Federal Tort Claims Act does not displace a *Bivens* claim against individual officers, because Congress does not view the FTCA as providing "equally effective" relief as *Bivens*. *Id.* at 23. This Court has never revisited this fundamental principle or called it into question in subsequent *Bivens* cases.[4]

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[4] Petitioners point to dictum in *Carlson* observing that the conclusion that the FTCA complements *Bivens*, rather than replaces it, "is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. *See* 38 U.S.C. § 4116(a), *42 U.S.C. § 233(a)*, 42 U.S.C. § 2458a, 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (malpractice by certain Government health personnel); 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); and 42 U.S.C. § 247b(k) (manufacturers of swine flu vaccine)." 446 U.S. at 20 (emphasis added). But this dictum does not prove what Petitioners claim. It states merely that Section 233(a) precludes actions for "malpractice," not that it bars constitutional claims. Indeed, one of the defendants in *Carlson* was a member of the PHS. The fact that the Court cited Section 233(a) without suggesting that the Assistant Surgeon General was entitled to special *Bivens* immunity supports Respondents in this case, not Petitioners. And it is telling that, although the Solicitor General cited Section 233 in the brief in *Carlson*, he did not seek special *Bivens* immunity for the

Under *Carlson* and related precedent, a wide range of federal officers and employees are currently subject to *Bivens* actions for constitutional violations. There is no principled reason for conferring a special immunity on PHS personnel, when similarly situated federal employees face *Bivens* claims, including Bureau of Prisons doctors treating incarcerated prisoners. Petitioners argue that PHS doctors are public-spirited and have made financial sacrifices as public servants, but the same is true for all categories of federal employees. Congress did not intend to draw an arbitrary distinction between PHS and other kinds of federal personnel with respect to actions that rise to the level of constitutional torts. All categories of federal employees perform important public functions, and there is no basis for singling out PHS personnel for special treatment with respect to *Bivens* claims.

The analytical framework of *Carlson* is fortified by three additional factors militating strongly in favor of a *Bivens* remedy against PHS officers and employees. First, as this Court recognized in *Carlson*, the threat of individual liability for official conduct that violates a person's constitutional rights is a powerful deterrent that Congress would not forego. *Carlson*, 446 U.S. at 21.

Second, under Petitioners' view, there would be no additional relief available from any party for violations of constitutional rights beyond that which is available under the Federal Tort Claims Act for non-constitutional torts. The additional quantum of

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Assistant Surgeon General. *See* 1979 WL 213535, *35 (Brief for the Petitioners) (describing Section 233 in a parenthetical as "rendering FTCA exclusive remedy for medical malpractice by officials of the Public Health Service").

harm arising from the fact of the constitutional violation would go uncompensated or unpunished. In general, this absence of relief would contravene the longstanding and fundamental principle that "a right implies a remedy." The Federalist No. 43, at 274 (J. Madison); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (describing the right to a remedy as "the very essence of civil liberty"); 3 W. Blackstone, Commentaries 23 (1783) (describing the "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded"). In the instant case, such a holding would treat no differently a case of simple negligence and a case that the district court described, based on the Government's own records, as "transcend[ing] negligence by miles." *Castaneda*, 538 F. Supp. 2d at 1298 n.16. This Court should not lightly presume that Congress has withdrawn a remedy for constitutional claims.

Third, this Court observed in *Carlson* that relief under the FTCA is necessarily contingent on the substantive laws of individual States and that Congress would ordinarily not leave the conduct of federal officials amounting to federal constitutional violations to be redressed solely according to "the vagaries of the laws of the several States." *Carlson*, 446 U.S. at 23. That observation is particularly salient in the context of federal immigration detainees, who are often transferred around the

country to facilities located in various States.[5] It would be passing strange if the protection of their federal constitutional rights from violations by federal officials should rest solely on the laws of the States through which they happen to pass in the course of their detention. Certainly, this Court should not readily attribute to Congress the intent to create such a peculiar system.

B. Section 233(a) Does Not Preclude A *Bivens* Claim.

Section 233(a) of Title 42, which is part of the Public Health Service Act and which was enacted as part of the Emergency Health Personnel Act of 1970, provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of Title 28 ... for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions ... by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee ... whose act or omission gave rise to the claim.

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[5] June 4 Hearing at 54, 68, 120; U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Immigration Detention Overview and Recommendations* 6 (Oct. 6, 2009) (available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf).

Section 233(a) does not refer expressly to constitutional claims, and the historical context in which it was enacted confirms that it does not bar *Bivens* claims. Section 233(a) was enacted prior to this Court's decision in *Bivens* (at the time of enactment, this Court had granted review in *Bivens*, but it did not issue its decision until the following year) and long before the recognition of Eighth Amendment claims based on the deliberate indifference to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97 (1976). Congress did not preclude constitutional tort suits against PHS employees in 1970 for the simple reason that such claims could not reasonably have been within the contemplation of the legislature. Thus, the reference in § 233(a) to "any other civil action or proceeding" with respect to "personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions," was limited to claims that had previously been recognized to exist (*i.e.*, common-law and statutory malpractice claims).

In fact, the key preemptive phrase in Section 233(a) – "exclusive of any other civil action or proceeding by reason of the same subject matter against the employee" – is identical to language in the Federal Drivers Act, which at the time provided that the FTCA was the exclusive remedy "for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C. § 2679(b) (1970).

The Federal Drivers Act was enacted in 1961. *See* Pub. L. No. 87-258, 75 Stat. 539 (1961). In 1961, Congress could scarcely have imagined that federal

employees operating automobiles would face constitutional claims, and it would be fanciful to argue that the language in the Federal Drivers Act encompassed constitutional torts. Accordingly, when Congress borrowed this language in 1970, there is no reason to think that Congress believed it was addressing constitutional claims.

The title of Section 233(a) in the Statutes at Large confirms as much. The title states: "Defense of Certain Malpractice and Negligence Suits." Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868, 1870 (1970). As this Court has explained, "the title of a statute and the heading of a section are tools available for a resolution of a doubt about the meaning of a statute." *Almendarez-Torres v. United States,* 523 U.S. 224, 234 (1998). Here, the title confirms that Congress' exclusive concern was extending immunity to common-law malpractice and negligence actions, rather than to constitutional claims.

The legislative history of Section 233(a) similarly suggests that Congress was concerned with common-law malpractice liability. Floor statements cited only medical malpractice; there was no mention of possible constitutional violations. *See* 91 Cong. Rec. H42,543 (1970) (statement of Rep. Staggers) ("So they have asked, if in the event there is a suit against a PHS doctor alleging malpractice, the Attorney General of the United States would defend them in whatever suit may arise."); 91 Cong. Rec. S42,977 (1970) (statement of Sen. Javits) ("I am pleased to support ... the provision for the defense of certain malpractice and negligence suits by the Attorney General."). Representative Staggers noted that the Surgeon

General had requested the amendment because PHS physicians "just cannot afford to take out the customary liability insurance as most doctors do." 91 Cong. Rec. H42,543. The comparison with doctors in private practice (who of course do not face the possibility of *Bivens* claims) underscores that Congress was focused on ordinary malpractice liability.

Petitioners suggest that the term medical "malpractice" encompasses constitutional torts. That suggestion is misplaced. The concept of *malpractice* certainly meant no such thing in 1961 or 1970, when the relevant statutory language was crafted. Even today, "malpractice" denotes negligence or incompetence in the performance of a professional duty,[6] rather than deliberate indifference to serious medical needs under conditions of government confinement that rises to the level of a Fifth or Eighth Amendment violation. Petitioners' argument is further foreclosed by the sharp distinction that this Court drew between malpractice and an Eighth Amendment violation in *Estelle v. Gamble*: "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." 429 U.S. at 106. Similarly, in *Bivens*, this Court rejected a view of "the relationship between a

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[6] *See Black's Law Dictionary* 978 (8th ed. 2004) (defining "malpractice" as synonymous with "professional negligence" and "medical malpractice" as a "doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances").

citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens," noting that an "agent acting-albeit unconstitutionally-in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 391-92. And the House Report accompanying the 1988 Westfall Act noted a "sharp distinction between common law torts and constitutional or *Bivens* torts" and suggested that a constitutional tort involves "a more serious intrusion of the rights of an individual that merits special attention." H.R. Rep. No. 100-700, at 6 (1988), 1988 U.S.C.C.A.N. at 5950. Hence, there is no basis for equating "malpractice" with constitutional torts.

C. The Westfall Act Confirms The Availability Of A *Bivens* Claim.

The availability of a *Bivens* remedy in this case is confirmed by the Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988). The Westfall Act provides in relevant part:

> (1) The [FTCA] remedy against the United States ... for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act ... of any employee of the Government ... is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee .... Any other civil action ... arising out of or relating to the same subject matter against the employee ... is precluded ....

> (2) Paragraph (1) does not extend or apply to a civil action ...
>
> (A) which is brought for a violation of the Constitution of the United States ....

28 U.S.C. § 2679(b)(1)-(2).

By amending the FTCA in this way, Congress made explicit what had been implicit at the time Congress enacted Section 233(a): that constitutional claims are outside the FTCA's purview. Constitutional torts have never been cognizable under the FTCA, and it would be illogical to construe Section 233(a) – enacted 18 years *prior to* the Westfall Act – as bringing constitutional claims against PHS employees back within the scope of the FTCA. There is no reason to think that before *Bivens* was even decided, Congress singled out PHS employees for a special *Bivens* immunity.

In fact, Congress sought to do the opposite in the Westfall Act. It sought to create a uniform rule for federal employees, including those covered by pre-Westfall Act immunity statutes like § 233(a). As this Court has observed, "[t]he Liability Reform Act's plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not." *United States v. Smith,* 499 U.S. 160, 172-73 (1991).

The Westfall Act provided all federal employees with immunity from common-law torts and simultaneously preserved personal liability for constitutional violations, which it assumed had existed prior to the *Westfall* decision. *See, e.g.,* H.R. Rep. No. 100-700, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948 (explaining that the effect of

the Westfall Act "is to *return* Federal employees to the status they held prior to the *Westfall* decision," and that "[s]uch an exclusive remedy *has already been enacted* to cover the activities of certain Federal employees") (emphasis added); *id.* at 6 (stating that this law "*would not affect* the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights") (citations omitted; emphasis added); 134 Cong. Rec. 29933 (daily ed. Oct. 12, 1988) (statement of Sen. Grassley) (noting that "this bill does not have any effect on the so-called Bivens cases or Constitutional tort claims, . . . *which can continue to be brought against individual Government officials*") (emphasis added).

In light of its reference to the FTCA, the scope of immunity in the Public Health Service Act must be construed according to the scope of the remedy available against the United States in the Westfall Act and therefore must include the *Bivens* exception. In fact, the Westfall Act is directly relevant because it was the vehicle under which the immunity defense was introduced in the instant case. The Westfall Act was the basis for the certification by the U.S. attorney that Petitioners were acting within the scope of their employment, which triggered the exclusive remedy provision of the FTCA and led to the substitution of the United States as a defendant with respect to certain claims. In this case, the scope certification was made pursuant to 28 U.S.C.

§ 2679(d)(1)[7] and Section 233(a). The defendants' motion to dismiss cited the Westfall Act and 28 U.S.C. § 2679 as well. Thus, the defendants in this action – and those in other suits involving PHS employees and federal officers – rely on the provisions of Section 2679 to invoke the exclusive remedy statute and substitute the United States as a defendant. There is no basis for ignoring the Westfall Act's express preservation of *Bivens* claims against individual federal officers.

D. The Structure of Section 233 Confirms The Availability of a *Bivens* Remedy.

The structure of Section 233 further underscores the relationship between the Public Health Service Act and the FTCA and confirms that the *Bivens* exception of the FTCA (made clear in the Westfall Act) applies to Section 233.

For example, Section 233(c) is the scope certification provision of the Public Health Service Act. Unlike the Westfall Act, which has two different provisions that address scope certification depending whether the action is filed against the employee in federal district court (28 U.S.C. § 2679(d)(1)) or in state court (28 U.S.C. § 2679(d)(2)), the Public Health

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[7] 28 U.S.C. § 2679(d)(1) provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant

Service Act has only one scope certification provision.[8] Section 233(c) provides for certification and removal from state court. There is no "federal" scope determination provision in the Public Health Service Act. While the Westfall Act recognizes that federal employees could be sued in federal court on a federal

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[8] Section 233(c) provides:

> Removal to United States district court; procedure; proceeding upon removal deemed a tort action against United States; hearing on motion to remand to determine availability of remedy against United States; remand to State court or dismissal.
>
> Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. *Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court*: *Provided*, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section. (emphasis added).

cause of action (*Bivens* or statutory), as well as in state court under a state common law theory, Congress could not have contemplated constitutional torts against individual PHS officers in federal court at the time of the passage of the Emergency Health Personnel Act in 1970, prior to the decision in *Bivens*. Section 233(c) provides further evidence that the phrase "any other civil action or proceeding" does not include constitutional claims.

Moreover, another portion of Section 233 confirms that the scope of the immunity in the Public Health Service Act has always been defined by the nature of the FTCA remedy. Section 233(e) extends the United States' liability for intentional torts committed by PHS personnel – and thus ensures that PHS personnel cannot be sued personally for such torts under state malpractice law. Section 233(e) provides:

> (e) Assault or battery
>
> For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

This provision avoids the risk that a federal officer committing an intentional tort might otherwise face malpractice liability under state law, in light of the FTCA's intentional tort exception. 28 U.S.C. § 2680(h). Congress took the same steps in other statutes, including 22 U.S.C. § 817(a) (enacted as part of Pub. L. No. 94-350) (1976), which addresses State Department medical personnel; 22 U.S.C. § 2702 (enacted as part of Pub. L. No. 96-465) (1980),

also addressing State Department medical personnel; 42 U.S.C. § 247b(k) (Pub. L. No. 94-380) (1976), governing Swine flu administrators; and 10 U.S.C. § 1054 (Pub. L. No. 99-661) (1986), regarding Defense Department attorneys. All of these statutes demonstrate the linkage between the FTCA and immunity statutes such as the Public Health Service Act. The scope of the immunity in Section 233(a) must be interpreted according to the scope of the remedy provided in the FTCA.

In addition, there are similar intentional torts provisions in the Veterans Administration (VA) immunity statute, 38 U.S.C. § 7316, Pub. L. No. 102-40 (1991), and in the Gonzalez Act, 10 U.S.C. § 1089, Pub. L. No. 94-464 (1976), which covers Armed Forces medical personnel. Both of these examples confirm yet again the relationship between immunity statutes and the FTCA, and their history is instructive. Before the VA statute was amended to include a provision exempting medical personnel from the intentional tort exception under Section 2680(h) of the FTCA, courts found that VA medical personnel could be sued for intentional torts under state law, despite the broad "exclusivity" language in subsection (a) of the statute.[9] *See, e.g.*, *Franklin v.*

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[9] Former 38 U.S.C. § 4116(a)(1) (current version at 38 U.S.C. § 7316(a)(1))

> The remedy-- (A) against the United States provided by sections 1346(b) and 2672 of title 28, or (B) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under section 1346(b) or 2672 of title 28, for damages for personal injury, including death, allegedly arising from malpractice or negligence of a health care

United States, 992 F.2d 1492, 1500 (10th Cir. 1993) (intentional tort claim); *Lojuk v. Quandt*, 706 F.2d 1456, 1463 (7th Cir. 1983) (permitting both an intentional tort claim and a *Bivens* claim against a VA doctor: "there is no official immunity from battery, because there is no alternative remedy available against the United States," and citing 42 U.S.C. § 233 as example of immunity statute); H.Rep. No. 93-368, 93d Cong., 1st Sess., reprinted in 1973 U.S.C.C.A.N. 1688, 1710 (noting "cases where Federal Tort claims actions would not lie, but actions could still be brought against the VA employee personally for actions arising in the exercise of his duties").

In response to this situation, Congress amended the VA Act in 1988 to add a provision virtually identical to Section 233(e) of the PHS Act. The legislative history explains that VA personnel had been protected from personal liability in medical malpractice actions arising from negligence, but that their immunity did not extend to intentional torts. The House Report reflects an understanding that the

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employee of the Administration in furnishing health care or treatment while in the exercise of that employee's duties in or for the Administration shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the health care employee (or employee's estate) whose act or omission gave rise to such claim.

extensions of VA personal immunity were contingent on the government's assumption of FTCA liability.[10]

Another provision demonstrating the relationship between the Public Health Service Act and the FTCA is Section 233(f), which authorizes the federal government to indemnify or provide insurance for PHS employees who negligently cause injury or death while assigned to work abroad and in circumstances "likely to preclude the remedies of third persons

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[10] H.R. Rep. No. 191, 100th Cong., 1st Sess. 17 (1987), 1988 U.S.C.C.A.N. 432, 450

> For many years, VA medical personnel have been protected from personal liability in medical malpractice actions arising out of allegedly negligent conduct in the furnishing of medical care or treatment to veterans. However, the Government does not extend this immunity to actions arising out of intentional conduct—so-called 'intentional torts'. In some instances, State law characterizes an act of medical malpractice as an intentional tort, leaving VA medical personnel potentially liable for an action for which the law intends the Government to assume liability. As an example, if a patient consents to an operation on his left elbow, but the physician mistakenly operates on the right elbow, responsibility for this action would lie with the United States. However, if the suit was based on a theory that a battery occurred, which is defined as any contact with a person without that person's consent, the Government is not allowed to assume the employee's liability. In essence, State law, which controls the character of the action brought against VA medical personnel, could defeat the intent of the Federal law to provide such employees with immunity. Therefore, the reported bill (section 301) would extend the same degree of protection to VA health care personnel as is currently afforded similar personnel in other Federal agencies.

against the United States" under the FTCA. 42 U.S.C. § 233(f). "The purpose of this section ... is to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable." S. Rep. No. 1264, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S.C.C.A.N. 4443, 4450-51. In other words, Section 233(f) reflects congressional understanding that notwithstanding Section 233(a), there are circumstances in which PHS officers assigned to foreign countries would face individual liability in connection with injuries or deaths caused by their negligence. Because it is congressional intent to protect such employees from personal liability, Section 233(f) provides the indemnification or insurance required. It is significant that Congress referred to injuries or deaths resulting from *negligent* conduct, because it was just such conduct that Congress intended to be brought against the United States pursuant to the FTCA, rather than against the individual. But if a Public Health Service officer stationed abroad were to cause injury or death in violation of the Constitution, Section 233(f) would not provide indemnification precisely because no PHS employee, whether stationed at home or abroad, receives protection under the Public Health Service Act for such individual liability.

Several provisions in Section 233 thus confirm that the scope of immunity for an individual officer or employee has always depended on the scope of the remedy provided in the FTCA. Because the FTCA has never included constitutional torts, Congress could never have intended that individual officer

immunity under Section 233(a) would extend to *Bivens* claims.

II. *BIVENS* CLAIMS AGAINST PHS PERSONNEL PLAY A VITAL ROLE IN PROTECTING CONSTITUTIONAL RIGHTS.

The hearings conducted by Congress on the issue of immigration detainee medical care have given it a unique perspective on the question presented by this case. The Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law heard personal testimony from Mr. Castaneda, whose sister and daughter are Respondents here, shortly before his death.

The public record establishes the need for a *Bivens* remedy against PHS officers and employees in appropriate cases to address deliberate indifference to serious medical needs that rises to the level of a constitutional violation. According to the Government Accountability Office, in 2006 nearly 300,000 men, women and children were detained by U.S. Immigration and Customs Enforcement (ICE), tripling the number of 2001, when fewer than 100,000 were detained.[11] In the year ending September 30, 2008, more than 407,000 persons spent time in custody.[12] A significant number of detainees spend more than 200 days in confinement.[13]

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[11] October 4, 2007 Hearing at 1 (statement of Rep. Lofgren).

[12] "In-Custody Deaths," available at http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html.

[13] June 4, 2008 Hearing at 89 (statement of Mary McCarthy, National Immigrant Justice Center).

As the Washington Post concluded in its four-part investigative series on the subject, detainees typically "have less access to lawyers than convicted murderers in maximum-security prisons and some have fewer comforts than al-Qaeda terrorism suspects held at Guantanamo Bay, Cuba."[14] Yet they are not terrorists or enemy combatants. Many have legal claims to U.S. residency and are not here unlawfully.[15] Some are legal U.S. residents accused of offenses including misdemeanors. Others are lawful immigrants seeking political asylum from danger in their own countries.[16] Still others are United States citizens who have been detained mistakenly.[17] The common thread is that all detainees in custody are completely dependent on governmental officers for access to necessary medical care, and the government has a clear, undisputed obligation to provide such care. Those with serious medical needs are at grave risk unless their conditions receive appropriate treatment.

The evidence assembled by Congress, as well as material collected through FOIA requests and other

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[14] *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, p. A1.

[15] June 4, 2008 Hearing at 89 (statement of Mary McCarthy, National Immigrant Justice Center).

[16] *Id.*

[17] *See Problems with ICE Integration, Detention, and Removal Procedures: Hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary, U.S. House of Representatives*, 110th Cong., 2d Sess. (Feb. 13, 2008) (Serial No. 110-80).

means by The New York Times, Washington Post, CBS News, and other independent media outlets, reveals tragedy after tragedy in which detainees have been denied safe and humane medical care.[18] One report concluded that detainees "are locked in a world of slow care, poor care and no care, with panic and cover-ups among employees watching it happen."[19] The Washington Post's investigation exposed "a hidden world of flawed medical judgments, faulty administrative practices, neglectful guards, ill-trained technicians, sloppy record-keeping, lost medical files and dangerous staff shortages."[20] Reports by the U.S. Government Accountability

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[18] *See, e.g.*, 60 Minutes, *Detention in America*, available at http://www.cbsnews.com/stories/2008/05/09/60minutes/main4083279.shtml; *Hurdles Shown In Detention Reform*, N.Y. Times, Aug. 20, 2009; *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, at A1; *In Custody, In Pain: Beset by Medical Problems as She Fights Deportation, A U.S. Resident Struggles to Get the Treatment She Needs*, Wash. Post, May 12, 2008, at A1; *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, Wash. Post, May 13, 2008, at A1; *Some Detainees Are Drugged For Deportation: Immigrants Sedated Without Medical Reason*, Wash. Post, May 14, 2008, at A1; *U.S. Admits Negligence in Detainee's Death*, San Francisco Chronicle, Apr. 29, 2008, at. B-3; *Immigrant Dead of Drug Combination*, Providence Journal, Sept. 20, 2007; *see also Health Care for Immigration Detainees: What Should Be The Standard?*, ABA Commission on Immigration (February 13, 2009).

[19] *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, at A1.

[20] *Id.*

Office noted similar concerns.[21] DHS's own inspections also showed noncompliance with medical standards in facilities where deaths occurred.[22]

ICE figures show that 107 persons have died in detention since October 2003, a number that could well be understated.[23] Reports have indicated that the agency undercounts the number of detention deaths and discharges some detainees shortly before they die.[24] A review of medical records by the Washington Post determined that actions or omissions by medical staff members may have contributed to at least thirty (30) of those deaths.[25]

In the case of Victoria Arellano, who suffered from advanced AIDS, a Public Health Service case

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[21] U.S. Government Accountability Office, "DHS: Organizational Structure and Resources for Providing Health Care to Immigration Detainees" (Feb. 2009); U.S. Government Accountability Office, "Alien Detention Standards: Observations on the Adherence to ICE's Medical Standards in Detention Facilities," in June 4, 2008 Hearing at 34-43.

[22] Department of Homeland Security, Office of the Inspector General, "ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities" (June 2008).

[23] In August 2009, ICE revealed that it had omitted ten in-custody deaths from an official list produced to Congress and the public. The omission was identified only after records pertaining to one of the previously uncounted and unreported deaths was produced in response to a Freedom of Information Act request. *See Officials Say Fatalities Of Detainees Were Missed*, N.Y. Times, Aug. 18, 2009.

[24] *Officials Obscured Truth Of Migrant Deaths in Jail*, N.Y. Times, Jan. 10, 2010, p. 22.

[25] *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, p. A1.

summary following her death concluded that the PHS staff at all levels failed to recognize symptoms of meningitis, failed to rule out various types of infections, delayed necessary lab work pursuant to a facility policy described as "dangerous," and ultimately provided incorrect medication.[26]

Boubacar Bah suffered a skull fracture and intracranial bleeding while detained at an ICE facility. Once he was taken to the detention health unit, Public Health Service personnel misdiagnosed his behavior as a disciplinary matter, had him restrained, and approved his placement in a segregation cell. For hours, guards repeatedly requested medical attention for Bah, as he began foaming at the mouth, lost consciousness, and became unresponsive, but they received no response. Bah later died after undergoing emergency surgery at the hospital.[27]

The hearings before Congress detail additional shortcomings, including failure to provide medication for mental illness and other serious medical conditions, dispensing improper drugs that triggered severe adverse reactions, and inadequate screening that failed to detect advanced stages of pregnancy, kidney stones, suicidal tendencies, and infectious disease.[28] In the 110th Congress, the Subcommittee

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[26] October 4, 2007 Hearing at 1, 54; *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008, at http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day1_arellano.pdf.

[27] *What Really Happened to Boubacar Bah*, N.Y. Times, Jan. 10, 2010.

[28] *See, e.g.*, June 4, 2008 Hearing at 83-99, 143-46, 161-204.

received testimony from an attorney who provided pro bono representation to an asylum seeker suffering from post-traumatic stress disorder. According to her testimony, Public Health Service personnel grossly misdiagnosed the detainee's condition and provided her with increasing doses of powerful antipsychotic medication, notwithstanding the appearance of dangerous side effects.[29] In response to requests for medical attention, guards threatened to move the detainee to segregation; she was housed at the same facility where Boubacar Bah had been placed for hours in segregation without medical attention until he was rushed to the hospital.

Moreover, evidence indicates that officials have sometimes engaged in cover-ups and outright falsification of medical reports and other documents to hide mistreatment.[30] A recent New York Times investigation showed, for example, that a detainee's medical chart was altered by facility health personnel after his death to indicate that he had been given a painkiller that was not actually administered. In another matter, a spokesman for the ICE told a reporter that she could learn nothing about the Bah case from government authorities, when in fact records show that the spokesman had already alerted officials to the reporter's inquiry, and they conferred at length about sending the man back to Africa to avoid embarrassing publicity and high costs for long-term care. Documents show that "[w]hile he lay in the hospital in a coma after emergency brain surgery, 10 agency managers in Washington and Newark

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[29] *Id.* at 97-98.

[30] *Officials Obscured Truth Of Migrant Deaths in Jail*, N.Y. Times, Jan. 10, 2010, p. 1.

conferred by telephone and e-mail about how to avoid the cost of his care and the likelihood of 'increased scrutiny and/or media exposure.'"[31] Ultimately, in an apparent effort to avoid paying $10,000 a month for nursing home care, officials decided to pursue "humanitarian release" to cousins in New York, despite the family's protest that they had no way to care for him. Days before the planned release, Bah died.[32]

Amici are well aware that the vast majority of PHS employees are dedicated public servants. They have nothing to fear from *Bivens* actions, in which plaintiffs must meet the stringent requirements of proving constitutional violations. The "deliberate indifference" test for medical care, for example, demands a far more exacting showing than mere negligence. Recognizing the exposure of PHS employees to *Bivens* liability simply places them in the same position as other federal employees who perform identical functions and are similarly subject to *Bivens* liability. It provides a manageable remedy that poses no danger to federal programs and in fact helps ensure proper administration of the government.

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[31] *Id.* at 1.

[32] *Id.*

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-1529

IN THE

Supreme Court of the United States

ESTHER HUI, et al.,

Petitioners,

v.

YANIRA CASTANEDA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL EXPERTS ON HEALTH SERVICES FOR DETAINED PERSONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are national experts on health services for detained persons.[1] They have decades of experience working in and overseeing government detention center health services programs. They are all strongly committed to the medical profession and

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

ensuring effective medical care for detained persons. They are well versed in appropriate standards of care and the challenges facing government doctors who serve in prisons, jails, and immigration detention centers throughout the nation.

Amici have carried out their duties as both doctors and government servants in the same circumstances, and under the same conditions, as respondents and other Public Health Service ("PHS") doctors. *Amici* have provided high level care to prisoners and detainees, even though they did not enjoy the extraordinary immunity sought by respondents in this case. Based on that long experience, *amici* believe that PHS will not be hindered in its mission if its medical personnel are held to the same minimal constitutional standards of care as others who treat detainees. Like *amici*, the overwhelming majority of PHS doctors are dedicated public servants whose decisions to serve their country and the public are not, and should not be, materially affected by such immunity considerations. And *amici* believe that any medical personnel whose decisions would be so affected should not be serving in the first place.

Amici have therefore filed this brief to explain why the absence of this extraordinary immunity will not have the disastrous effects that petitioners and their supporters claim. The brief also seeks to underscore the serious separation-of-powers concerns implicated by petitioners' position that Congress will be deemed to have abrogated a recognized constitutional remedy without any indication that Congress ever considered that specific issue. Because the claims in this case arise directly under the Constitution, any decision by the legislature to exempt a single category of government doctors (but not others similarly

situated) from constitutional requirements should be stated clearly and explicitly, after consideration of all relevant concerns.

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Menard Correctional Facility and has testified as an expert on health care in prisons in numerous federal courts. Dr. King has authored or co-authored eight articles concerning health care in prisons and jails in peer reviewed medical journals. In 2008, he received the Bernard Harrison Award from the National Commission on Correctional Health Care.

INTRODUCTION

Amici have decades of experience working in and overseeing government detention center medical services, without the extraordinary immunity that respondents now seek. And while *amici* have confronted many challenges, inability to recruit or function due to potential constitutional liability has not been one of them. In *amici*'s view, a ruling that PHS personnel have no special immunity from claims of deliberate indifference to serious medical needs will not adversely affect medical care for detainees, given (1) the minimal nature of the constitutional standard of care, (2) the absence of increased litigation burdens from such additional causes of action, and (3) the availability of insurance and indemnification. Such a ruling also will not impede PHS's ability to recruit competent personnel, just as it has not impeded the ability of the other federal, state and local agencies that treat detainees. By assuming that the absence of immunity will affect recruitment and deployment, petitioners and their *amici* underestimate the professionalism of government doctors who serve the public and their country.

Doctors who serve at detention facilities—whether they are employed by the Bureau of Prisons, the Department of Immigration Health Services ("DIHS"), a state or locality, or PHS—are medical

professionals dedicated to providing high level care that far exceeds the minimal requirements of the Constitution. They have done so, and will continue to do so, notwithstanding the absence of the special immunity now sought by petitioners. That much is clear from the fact that thousands of doctors remain employed by the Bureau of Prisons, DIHS, and state and local governments, yet detention center medical services have not crumbled under the threat of constitutional claims. Quite to the contrary, agencies have no urgent need to seek out or retain those who would not serve unless they are guaranteed immunity from minimal constitutional standards that apply to all other government medical personnel.

Petitioners and the government also ignore that this case is not merely an exercise in statutory construction, but is ultimately about the requirements of the *Constitution*. The question is whether Congress intended to abrogate a recognized constitutional remedy by establishing a statutory scheme it viewed as equally effective. Because of the legislature's special expertise in fashioning remedial schemes, the Court has indicated a willingness to defer to Congress when there is an "explicit congressional declaration" to abrogate a remedy for constitutional violations in favor of "another remedy, equally effective in the view of Congress." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). But as in other areas implicating the separation of powers, the Court should not hold that a recognized remedy required by the Constitution has been abrogated by legislative action unless Congress has clearly stated its intent to do so, in favor of another remedy that Congress has expressly viewed as equally effective.

Here, there is no clear statement of Congress's intent to bestow on PHS medical personnel a special immunity from constitutional claims not provided to other government employees performing identical functions. The statute invoked by petitioners, 42 U.S.C. § 233(a), was enacted before *Bivens* was even decided, proving that Congress could not have contemplated that it would provide immunity from such claims. And when Congress did expressly consider the issue after *Bivens* for all federal employees, it expressly determined that the statutory remedy under the Federal Tort Claims Act ("FTCA") was *not* sufficient to vindicate claims under the Constitution. Thus, when the issue was explicitly considered, the FTCA remedy was found not to be "equally effective in the view of Congress." *Bivens*, 403 U.S. at 397. If Congress wishes to change that result for the narrow category of PHS personnel—and there is no reason why it should—it must expressly consider the issue and say so clearly. The Court should not defer to Congress's judgment regarding the appropriate remedies to vindicate recognized constitutional rights unless Congress has actually exercised that judgment.

ARGUMENT

I. CONGRESS DID NOT PROVIDE A CLEAR STATEMENT THAT IT INTENDED TO ABROGATE JUDICIAL REMEDIES FOR CONSTITUTIONAL VIOLATIONS.

A. If Congress Intends To Abrogate A Recognized Constitutional Remedy, It Must Clearly State That Intent.

"In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of

clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *U.S.* v. *Bass*, 404 U.S. 336, 349 (1971). Such clear statement rules ensure that statutes are not interpreted so as to strain the boundaries of Congress's constitutional power or impede significant rights unless Congress clearly states an intention to do so. They improve the dialogue between Congress and the courts by ensuring that the courts do not wrongly interpret statutes in ways that impose restrictions on fundamental rights or threaten constitutional checks and balances. *Id.*

The Court has invoked clear statement rules in the context of, among other things, federal criminal jurisdiction, constitutional requirements for state office-holders, regulation of foreign-flagged vessels, and the courts' habeas corpus jurisdiction.[2] When the Court invokes the clear statement rule, Congress can subsequently "make an informed legislative choice either to amend the statute or to retain its existing text." *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2243 (2008).

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[2] *See Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 130 (2005) (plurality) ("Absent a clear statement of congressional intent, general statutes may not apply to foreign-flag vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel, rather than the peace of the port."); *INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001) ("[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction"); *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (Age Discrimination in Employment Act does not override state mandatory retirement provision for judges); *Bass*, 404 U.S. at 349 ("we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction").

Clear statement rules are perhaps most important where, as here, a statute is alleged to abrogate a recognized constitutional claim. "This Court has held that 'where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.'" *Demore* v. *Kim*, 538 U.S. 510, 517 (2003) (citation omitted); *see also Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (statutory provision denying judicial review of any claim challenging employment termination decision of Director of the CIA did not apply to constitutional claims because Congress did not clearly state an intention to include them in the prohibition). "[T]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced." *Davis* v. *Passman*, 442 U.S. 228, 241 (1979). If Congress is alleged to have supplanted the Court's primary role in determining the requirements of the Constitution, that action directly implicates separation of powers. And "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001).

Thus, in *St. Cyr*, the Court held that Congress had not expressed the requisite clear statement of its intent to abrogate the writ of habeas corpus, noting that the writ serves as a critical judicial check on Executive detention powers. *Id.* at 301-05. The Court recently reaffirmed this fundamental separation-of-powers principle, recognizing that, as a check on Executive power, the writ "must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene*, 128 S. Ct. at 2259.

To *amici*'s knowledge, this Court has *never* held that a statute abrogated a previously-recognized

Bivens remedy for constitutional violations.[3] But in *Bivens* itself, the Court explained that any such abrogation would be subject to a clear statement rule. As the Court noted, it would be appropriate to defer to Congress's establishment of an alternative remedy only where there has been an "*explicit* congressional declaration" to abrogate a *Bivens* remedy in favor of "another remedy, equally effective in the view of Congress." *Bivens*, 331 U.S. at 397 (emphasis added). For Congress to supplant this Court's role as the arbiter of constitutional rights, its declaration of an intent to abrogate a *Bivens* remedy must be "explicit" and the alternative remedy must be considered equally effective "in the view of Congress."

The reasons for the clear statement rule in this context are readily apparent. The *Bivens* cause of action for deliberate indifference to serious medical needs is the judiciary's check on the power of the Executive to inflict unconstitutional harm on detained persons. *See Carlson* v. *Green*, 446 U.S. 14, 25 (1980) (state officials are subject to Section 1983 actions, and "[a] federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a *Bivens* action"). The Court has indicated a willingness to defer to Congress's determination regarding appropriate remedies, but that deference is warranted only because of the legislature's relative expertise in balancing the relevant policy considerations. *Cf. Bush* v. *Lucas*, 462 U.S. 367, 389 (1983) ("Congress is in a far better

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[3] The Court has, on occasion, relied on the existence of statutes, along with other factors, in deciding whether to recognize a new *Bivens* cause of action. But as explained below, this case does not raise that issue because the Court long ago recognized the cause of action asserted by respondents.

position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service" given its familiarity with the policy issues and its ability to "inform itself through factfinding procedures such as hearings").

Such deference, however, makes sense only if Congress has actually engaged in the relevant analysis as to whether a recognized *Bivens* remedy for constitutional wrongs should be supplanted by an alternative remedy that is "equally effective in the view of Congress." *Bivens*, 331 U.S. at 397. *See Carlson*, 446 U.S. at 22 n.10 ("the inquiry is whether Congress has created what it views as an equally effective remedial scheme") (emphasis omitted). Put another way, an alternative remedy such as the FTCA cannot be equally effective to a recognized *Bivens* remedy "in the view of Congress" unless Congress has expressly considered the merits of each and has clearly stated its preference as between the two. Any other resolution devalues this Court's role as the ultimate arbiter of what the Constitution requires. As Justice Harlan explained in his separate opinion in *Bivens*, "the judiciary has a particular responsibility to assure the vindication of constitutional interests" and while legislatures also safeguard the liberties and welfare of the people, "it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities." *Bivens*, 331 U.S. at 407 (Harlan, J., concurring).

B. Congress Did Not Clearly State An Intent To Abrogate Bivens Liability For PHS Officials In Section 233(a).

Section 233(a) is not the requisite clear statement of Congress's intent to abrogate the *Bivens* cause of action as to PHS doctors. In order to defer to Congress's resolution of the issue, there must be clear proof, in the language of the statute, that Congress actually contemplated that Section 233(a) would abrogate the *Bivens* cause of action for deliberate indifference to serious medical needs, or at least *Bivens* causes of action generally. *Cf. Demore*, 538 U.S. at 517 ("Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail."). Neither petitioners nor their *amici* provide any indication that Congress expressly contemplated that the FTCA would supplant a *Bivens* remedy for PHS personnel—but not similarly situated government doctors.

Nor could they. When Section 233(a) was enacted, *Bivens* had not yet been decided. And this Court did not definitively hold that claims like those at issue here are cognizable under *Bivens* until 1980, when *Carlson* was decided. Thus, the Congress that enacted Section 233(a) did not consider, and could not have considered, whether that statute should supplant a *Bivens* remedy that had not yet been recognized. Moreover, when Congress *did* expressly consider the issue for all government employees as a group, it reached the opposite conclusion. When Congress expressly considered the interplay between *Bivens* claims and the FTCA in 1988, it determined that the FTCA remedy would *not* supplant

constitutional claims. *See* 28 U.S.C. § 2679(b)(1), (2) (exclusivity of FTCA remedy "does not extend or apply to a civil action against an employee of the Government * * * which is brought for a violation of the Constitution of the United States").

The Solicitor General settles for speculation that Congress *might* have considered the potential that the Court would rule the way it did in *Bivens* because that case was pending at the time Section 233(a) was passed. *See* U.S. Br. 16 ("Congress may well have been aware of the concept of a constitutional tort when it enacted Section 233(a)"). But this kind of conjecture cannot satisfy the clear statement rule and it provides no basis for this Court to defer to Congress when Congress both failed to consider the issue when Section 233(a) was enacted and resolved against abrogating *Bivens* claims when it did expressly consider the issue.

In *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775 (1991), this Court considered a statute stating that "[t]he district courts shall have original jurisdiction of *all civil actions*, brought by any Indian tribe * * *, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." *Id.* at 783 (emphasis added). The Court had previously interpreted this provision broadly to give Indians a right to pursue actions against state taxation that were otherwise prohibited by federal statute. *Id.* at 784. Still, the Court held in *Blatchford* that the statute did not abrogate states' constitutional Eleventh Amendment immunity because Congress had not clearly stated its intent to do so. The clear statement rule controlled because the "obstacle to suit" in *Blatchford* was not statutory; it was constitutional. *Id.* at 785.

And a "willingness to eliminate the former in no way bespeaks a willingness to eliminate the latter." *Id.*

So too here. Congress did not contemplate eliminating constitutional remedies when it enacted Section 233(a), and its willingness to abrogate statutory causes of action as to PHS personnel provides no indication that it intended to abrogate constitutional claims as well. Indeed, the case for applying the clear statement rule is even stronger here, because this case, unlike *Blatchford*, involves constitutional claims that were not even recognized when the statute was passed. The issue cannot be resolved based on speculation about what Congress *might* have concluded had it expressly considered the issue, because Congress's intent to abrogate constitutional rights must be "'unmistakably clear *in the language of the statute*.'" *Id.* at 786 (citation omitted; emphasis added).

Petitioners and their *amici* wrongly contend that this case is a simple matter of reading Section 233(a) and applying its words wholly divorced from the legal context in which they were written. As in *Blatchford* and other clear-statement cases, that is not so. Respondents have convincingly shown that the statutory scheme, considered as a whole, evinces no intent to abrogate *Bivens* actions against PHS personnel. But that dispute ultimately does not matter. Under the clear statement rule, even otherwise unambiguous statutory language will not be construed to abrogate constitutional remedies or defenses unless Congress specifically provides that it will. *See Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) (statute giving district courts jurisdiction over "all civil actions" of a particular type does not apply when a state that has not waived

sovereign immunity is sued). This case is ultimately about what the *Constitution* requires, and separation-of-powers principles dictate that Congress's purported resolution of an issue so as to abrogate constitutional rights will not govern the Court's actions unless Congress actually considers the issue and clearly states its view.

As shown below, there would be no valid policy basis for Congress to grant a special immunity from constitutional claims for PHS personnel performing the same services as other government doctors who treat prisoners and other detainees. But there is plainly no cause for this Court to abrogate a recognized constitutional remedy by deferring to a policy judgment that Congress never made.

C. This Case Does Not Require Recognizing Any New Constitutional Right.

Petitioner Hui argues that this case requires the Court to determine, as an initial matter, whether to recognize the *Bivens* cause of action asserted by petitioners. *See* Hui Br. 19-20. It does not. Under *Carlson*, an applicable *Bivens* cause of action already exists. Four years before *Carlson*, the Court recognized a constitutional right, actionable against state employees under 42 U.S.C. § 1983, to be protected against deliberate indifference to their serious medical needs. *See Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). *Carlson* recognized a cause of action under *Bivens* through which federal detainees could also seek redress for violations of that right. *See Carlson*, 446 U.S. at 17 n.3 ("Petitioners do not contest the determination that the allegations satisfy the standards set out in *Estelle*."). The only question in this case is whether Congress should be deemed, through a pre-existing statute, to have abrogated

that recognized cause of action for PHS employees, but not their similarly situated counterparts employed by other agencies.

Hui claims that the facts here arise in a different context—prison vs. immigration detention—and are applied to a different set of defendants—Bureau of Prisons personnel vs. PHS personnel, Hui Br. 19-20, but she does not explain how those distinctions make a difference. *Carlson* itself involved a PHS defendant, Resp. Br. 49 n.24, and the Court recognized a *Bivens* cause of action against any federal employee who is responsible for the medical care of detained persons. *Carlson*, 446 U.S. at 25. The Court did not distinguish between Bureau of Prisons doctors and PHS doctors, and, as explained below, there is no reason for it to have done so.

Nor is the location of detention relevant to whether a cause of action exists under *Bivens*. *Carlson* certainly did not limit itself solely to prisons. A prisoner "must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle*, 429 U.S. at 103. Similarly, an immigration detainee cannot simply leave and pursue medical attention on his own. Castaneda, for example, was completely reliant on authorities at the detention center for a year; yet he did not receive appropriate medical care until he was released, and by then it was too late. Thus, both the context giving rise to a *Bivens* cause of action and the role of the defendants are exactly the same in all relevant respects in *Carlson* and this case.

Since *Bivens* was decided, the Court has shown restraint in recognizing additional constitutional causes of action, based on its desire not "'to create a new substantive legal liability.'" *Schweiker* v.

Chilicky, 487 U.S. 412, 427-28 (1988) (citation omitted). *See also Correctional Svcs. Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001). But those considerations are immaterial in this case, because the Court already weighed them in *Carlson*. The applicable cause of action here has been firmly established for three decades. Castaneda has colorable claims under *Carlson* unless Section 233(a) abrogates them. *Cf. St. Cyr*, 533 U.S. at 308 (analyzing issue as exception to *habeas* jurisdiction because "under the pre-1996 statutory scheme * * * it is clear that St. Cyr could have brought his challenge * * * in a habeas corpus petition").

Thus, the question presented here is whether the applicable *Bivens* claim stated in *Carlson* is abrogated as to PHS employees by Section 233(a), even though it exists for other government employees, including those performing indistinguishable functions. Discussion of "special factors" and other standards for declaring a new *Bivens* remedy is irrelevant because this Court already addressed and resolved those issues in *Carlson*.

II. DECLINING TO AFFORD PHS PERSONNEL EXTRAORDINARY IMMUNITY WILL NOT ADVERSELY AFFECT PHS OR DETAINEE MEDICAL CARE.

Allowing *Bivens* actions against PHS personnel for deliberate indifference to the serious medical needs of detained persons would not undermine PHS's ability to execute its mission. It would not even place a minor hardship on PHS or its personnel. The Commissioned Officers Association of the United States Public Health Service speculates that allowing *Bivens* actions will (1) impede PHS's ability to recruit and retain personnel and (2) destroy its

ability quickly respond to medical emergencies. Association Br. 5-10. Neither is true. As *amici* can attest, federal, state and local agencies that treat detainees are able to recruit competent personnel notwithstanding the absence of the extraordinary immunity sought by petitioners here.

1. There is no support for the Association's claim that the added risk of constitutional lawsuits will deter competent personnel from joining PHS's ranks. Indeed, it would demean the medical profession to suggest otherwise. To be found liable on a *Bivens* claim, a doctor must shirk his or her duties in a way that violates the most basic principles guiding every doctor—regardless of the doctor's experience or capabilities. "Deliberate indifference to serious medical needs" requires a failure of medical care so fundamental that PHS would do better to avoid employing anyone concerned that his or her care will be viewed as that deficient.

As experts in medical care for prisoners and other detainees, *amici* can attest that the small risk of constitutional lawsuits does not materially affect the willingness of medical personnel to provide such services. *Amici* and tens of thousands of other dedicated medical personnel have provided high quality care to detainees for decades while being employed by federal, state, and local agencies that do not enjoy the special immunity now being sought by petitioners. Indeed, it is not uncommon for PHS and non-PHS personnel to serve side-by-side, treating the same detainees in the same institutions.[4] Yet state

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[4] *See, e.g.*, U.S. Dep't of Justice, *The Federal Bureau of Prison's Efforts to Manage Inmate Health Care* 4 (2008) (www.justice.gov/oig/reports/BOP/a0808/final.pdf) (the Bureau of Prisons' Health Services Units "are staffed by a combination

prisons have competent medical staffs, and the Bureau of Prisons and DIHS are able to recruit and retain competent doctors.

Petitioners and their *amici* provide no reason why PHS doctors cannot provide the same high quality care as their non-immunized counterparts. They do not identify any PHS doctors who claim they would not have joined PHS if they had known they would be subject to the same potential *Bivens* liability as doctors employed by other agencies. Nor could they. There is no reason to believe that the doctors that PHS recruits are any less dedicated than the doctors serving state prison systems, the Bureau of Prisons, and DIHS. And there is no reason to believe that the remote possibility of *Bivens* liability will deter any doctor or other medical professional from choosing a career in public service with PHS. But to the extent any people would be so deterred, public agencies have no need to employ them.

The only relevant deterrent effect is that the possibility of constitutional claims may assist in preventing medical personnel from deliberately withholding life-saving treatment. *See Carlson*, 446 U.S. at 21. That kind of deterrence, however, should be encouraged, not eliminated.

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of BOP health care employees and PHS personnel consisting of physicians, dentists, physician assistants * * *"); *Problems With Immigration Detainee Medical Care: Hearing Before H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law*, 110th Cong. 4 (June 4, 2008) ("we have historically relied on the independent medical judgment of the professionals within DIHS, which include doctors, clinical support professionals and support staff (some of whom are detailed to DHS from the U.S Public Health Service (PHS))") (statement of Julie L. Myers, Asst. Sec'y, U.S. Immigration and Customs Enforcement).

2. There is also no support for the Association's claim that extraordinary immunity from constitutional claims is needed for PHS personnel (but not their similarly situated counterparts in other agencies) because of a purported pay gap between PHS and private sector doctors. The Association's claim of a 13.5% pay differential between PHS and private sector employees, Association Br. 6, is speculative at best.[5] But even if there is a gap, PHS doctors receive benefits in addition to compensation that "often exceed those found in the private sector." PHS, *Comp. and Benefits at Commissioned Corps* (www.usphs.gov/questionsanswers/compensation.aspx) ("PHS Compensation and Benefits"). For instance, PHS personnel are eligible for retirement benefits after 20 years of service. *Id.* Doctors in private practice generally do not have a pension waiting for them when they turn 50. Additionally, PHS doctors are entitled to free medical and dental care, low cost health care for their families, shopping privileges at lower-cost stores on military bases, Veterans Affairs benefits, and a host of other valuable benefits. *Id.* But more importantly, any gap in compensation between public and private employment would exist not just in PHS, but also in the dozens of other federal, state and local agencies that treat prisoners

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[5] The Association cites a House of Representatives bill that was not passed, but the bill does not purport to make any findings about any PHS pay gap. Military Pay Comparability Act of 2003, H.R. 1885, 108th Cong. § 2(4) (2003). It discusses a pay gap for military personnel in general, and notes that the gap had *shrunk* an unspecified amount from a peak of 13.5%. *Id.* And the Association's argument is belied by the PHS itself, which states that PHS doctors receive "competitive starting pay." PHS, *Comp. and Benefits at Commissioned Corps* (www.usphs.gov/questionsanswers/compensation.aspx).

and other detainees. Just as those other agencies are able to attract competent personnel and provide quality care notwithstanding the lack of immunity for constitutional claims, so can PHS.

Nor is there any basis for the Association's claim that a lack of immunity from *Bivens* claims will subject them to additional, intolerable litigation burdens. *Amici* share a concern regarding frivolous and unfounded malpractice claims. But in any conceivable *Bivens* case based on deliberate indifference by PHS medical personnel, the purported victim also has a right to sue the United States for medical malpractice under the FTCA. *See* 42 U.S.C. § 233(a). Accordingly, the litigation burdens will be substantially the same if *Bivens* claims are also allowed to proceed. The parties will engage in virtually the same discovery and litigation as they otherwise would have if PHS personnel were immune to *Bivens* claims. The PHS doctors would have to engage in witness interviews and depositions regardless. And they do not need counsel because the Department of Justice will represent their interests or, as here, pay for separate counsel in the event of a conflict. *See* 28 C.F.R. §§ 50.15(a), 50.16.

The only relevant difference is that *Bivens* claims are significantly harder, not easier, to bring than ordinary malpractice claims. Under such claims, PHS doctors will only be liable for deliberate indifference to a detainee's serious medical needs. To establish deliberate indifference, the detainee must prove that the doctor's care offended contemporary standards of decency or "constitute[d] 'an unnecessary and wanton infliction of pain.'" *Estelle*, 429 U.S. at 105. That is a very high standard that few claims can meet. *Brewster* v. *Dretke*, 587 F.3d

764, 770 (5th Cir. 2009) ("Deliberate indifference is an 'extremely high' standard to meet.") (citation omitted). And PHS personnel possess qualified immunity from many of these constitutional claims. *See Butz* v. *Economou*, 438 U.S. 478, 507 (1978).

The Association expresses a concern that if PHS doctors are not excepted from *Bivens* liability, they will be forced to buy "prohibitively expensive" medical malpractice insurance. Association Br. 6. That is untrue. PHS provides malpractice insurance for its personnel. *See* PHS Compensation and Benefits, *supra*. And the Federal government routinely indemnifies its employees from any liability for actions performed in their official duties. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 Georgetown L.J. 65, 77 (1999). But in the event that a PHS doctor still wishes to purchase additional insurance for *Bivens* claims, such coverage—reflecting how difficult it is to successfully assert such claims—is quite inexpensive. Federal employees can purchase $1 million of personal liability insurance coverage covering *Bivens* claims, among other things, for only $270 per year. *See* Federal Employee Defense Services, *Professional Liability for Federal Employees—Real Scenario DHS Agent* (www.fedsprotection.com/services.asp). And for some federal employees, the agency covers half of the cost. *Id.* This insurance also does far more than cover *Bivens* claims. It provides counsel for administrative investigations, disciplinary proceedings, and criminal actions, and to monitor civil actions when the Department of Justice is representing the insured's interests. *Id.* In 2001, average annual medical malpractice insurance

premiums often ranged from $10,000 to $173,000, depending on specialty and location.[6] Compared to that, $270 is hardly "prohibitively expensive." Association Br. 6.

3. The Association's claim that potential *Bivens* liability will impede PHS operations also lacks merit. There is no basis to believe that PHS doctors will shirk their rapid response duties if this Court does not except them from otherwise-applicable *Bivens* liability. The Association claims that potential *Bivens* liability would hinder PHS's ability to respond to "terrorist acts * * *; industrial or transportation accidents; and weather-related catastrophes." Association Br. 8. But there is no recognized *Bivens* remedy available under these circumstances, and no reason to believe that the Court will recognize one. *Carlson* identified a narrow cause of action for deliberate indifference to the serious medical needs of detainees. Neither *Carlson* nor any other precedent of this Court recognizes a *Bivens* cause of action for non-custodial medical care, or care in an emergency, mass-casualty incident.[7]

The four "Core Values" of PHS are "Leadership," "Service," "Integrity," and "Excellence." PHS, *Commissioned Corps Core Values* (www.usphs.gov/aboutus/corevalues.aspx). PHS describes an officer with integrity as one who "[e]xemplifies uncompromising ethical conduct and maintains the highest standards [of] responsibility and accountability." *Id.*

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[6] Robert P. Hartwig, *Medical Malpractice Insurance*, Insurance Information Institute 13 (June 2003) (http://server.iii.org/yy_obj_data/binary/729103_1_0/Medmal.pdf).

[7] Even if a *Bivens* claim existed in these circumstances, qualified immunity would likely protect PHS medical personnel in a case involving "exigent circumstances." Association Br. 8.

Yet the petitioners claim that PHS employees should be less accountable and less responsible than similarly situated doctors employed by the Bureau of Prisons, DIHS, and state and local governments. There is no reason to assume that Congress intended to provide PHS with an extraordinary immunity from constitutional violations that is not enjoyed by other government employees doing the same work. And under this Court's precedents, the Court should not defer to any such decision unless Congress has clearly stated its intent to abrogate constitutional remedies after consideration of all relevant concerns.

CONCLUSION

For these reasons, and those set forth by respondents, the judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

ESTHER HUI AND STEPHEN GONSALVES,
Petitioners,

v.

YANIRA CASTANEDA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCISCO CASTANEDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF RESPONDENTS

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U.S. Public Health Service Commissioned Corps, http://www.usphs.gov/aboutus/questions.aspx (last visited Jan. 19, 2010) 21

INTEREST OF *AMICUS CURIAE*[1]

The National Immigrant Justice Center ("NIJC") is a nationally-recognized non-governmental organization ("NGO") that provides direct legal services to thousands of detained and non-detained immigrants and asylum-seekers each year. This direct services expertise informs NIJC's advocacy, litigation, and educational initiatives, promoting the rights of individuals on a local, regional, national, and international stage. NIJC, along with its network of over 1000 pro bono attorneys, monitors detention conditions for immigrant detainees and regularly observes basic rights violations at detention facilities. Through relationships and partnerships with policymakers and NGOs, NIJC is a leader in advocating for due process protections and in addressing human rights issues facing noncitizens.

SUMMARY OF THE ARGUMENT

Because *Bivens* actions play an important function of exposing and labeling as unconstitutional mistreatment that falls below constitutional standards – mistreatment which otherwise would remain unchecked – the repeated failure of immigration authorities to ensure adequate medical treatment for all immigrant detainees ought to weigh heavily in this Court's decision in this matter. Amicus submits this

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[1] Pursuant to Rule 37.6, Amicus Curiae states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund this brief's preparation or submission. Each party has consented to the filing of this brief. The parties' letters of consent are filed with the Court.

brief to draw the Court's attention to grave and continuing problems in medical treatment of detainees in the immigration detention system.

The immigrant detainee population is held in custody by ICE in a sprawling labyrinth of detention facilities owned by various governmental entities and private companies. The Division of Immigration Health Services ("DIHS") serves as ICE's medical authority as to those detainees. DIHS provides for the primary health care of detainees housed in ICE detention centers and also provides or arranges for health care for other ICE detainees. Although ICE has detention standards for medical care, the standards are not themselves legally enforceable. Immigrant detainees, who have no right to counsel and speak limited English, face insurmountable procedural obstacles when they request medical treatment.

Over the past decade, serious problems with medical care provided to immigrant detainees have been reported in study after study, and have been reported extensively by the media. These reports tell chilling stories of preventable suffering. As one nurse was quoted as saying, "Dogs get better care in the dog pound." These reports have led Congress to hold hearings on the treatment of immigrant detainees, and has led to investigations by the Government Accountability Office ("GAO") and Executive branch officials. But these efforts have not led thus far to significant improvements, and in the absence of continued attention to these issues – attention that *Bivens* actions would garner – improvements are unlikely.

Finally, while the Petitioners understate the importance of *Bivens* actions in labeling and deterring unconstitutionally deficient treatment, they overstate the importance of liability insurance. Petitioners and Amici in support of Petitioners focus on the alleged effects which the Ninth Circuit's decision would have on the U.S. Public Health Service's ("PHS") recruitment. This overlooks the fact that PHS, itself, states that it provides malpractice liability insurance to its recruits.

ARGUMENT

I. THE GROWING IMMIGRANT DETAINEE POPULATION IS HELD IN CUSTODY IN A LABYRINTH OF DETENTION FACILITIES OWNED BY VARIOUS GOVERNMENT ENTITIES AND PRIVATE COMPANIES.

Instead of developing a network of centers run by the federal government, ICE subcontracts to a variety of entities for "jail space," a rotating collection of jails that take turns housing ICE detainees for unpredictable lengths of time. In 2008, 378,582 immigrant detainees from 221 countries were held in custody or supervised by ICE. Dr. Dora Schriro, Immigration and Customs Enforcement, U.S. Department of Homeland Security, *Immigration Detention Overview and Recommendations*, October 6, 2009, available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. That makes ICE detention the largest detention system in the country, *id.* at 2, a vast labyrinth of disparate detention facilities located throughout the country, each of which have different functions and ownership. Service Processing Centers (SPCs) are owned by ICE

and staffed by a combination of federal and contract employees; Contract Detention Facilities (CDFs) are owned by private companies that contract directly with the government and are also staffed by federal and contract employees; and Inter-Governmental Service Agreement facilities (IGSAs) are operated by local governments and are usually public facilities but can also be privately owned. Dedicated IGSAs are facilities with detention space reserved exclusively for ICE. Other facilities used by ICE include staging facilities for transportation, holding facilities, and hospitals for emergency care. *Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody*, Hearing on March 3, 2009, before the H. Appropriations Comm., Subcomm. on Homeland Security 2 (statement of James T. Hayes, Director, Office of Detention and Removal Operations), available at http://appropriations.house.gov/Witness_testimony/HS/James_Hayes_03_03_09 .pdf.

The total number of detainees in 2009 is estimated to have reached at least 369,483, which is more than twice what the total was a decade ago in 1999. *TRAC Immigration, Huge Increase in Transfers of ICE Detainees* (2009) http://trac.syr.edu/immigration/reports/220 (the "TRAC Report"). As of March 2009, approximately 67 percent of the ICE population was in IGSA facilities, the approximately 300 state and local jails that receive a daily fee for their bed space under contracts with ICE, 15 percent were in contract Detention Facilities, and 10 percent were in ICE-owned facilities, with the remainder housed by the Office of Refugee Resettlement, the Bureau of Prisons, or other, less restrictive detention settings. Statement of James T. Hayes at 2.

At any one point, ICE employs approximately 350 jails and detention centers, Department of Homeland Security, Office of Inspector General, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities* OIG-08-52, June 2008, 2, available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf ("OIG-08-52 Report"), but the actual centers being used are in a state of constant flux. A study by TRAC found that for the period from October 1, 1998 through March 31, 2008, immigrant detainees were housed in 1,528 different facilities. During the 12-month period of April 1, 2007 through March 31, 2008, ICE detainees were housed in 654 different facilities.[2] ICE's "average daily detainee population in December 2007 was 28,702, which was a 61% increase compared to January 2006." OIG-08-52 Report at 2. In 2009, ICE detained more than 32,000 aliens on an average day." Department of Homeland Security, Office of Inspector General, *The*

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[2] The TRAC Report analyzed and used data received from FOIA requests to ICE and records obtained by Human Rights Watch through its independent FOIA request. In the Report, TRAC states that its "efforts to obtain data about individual ICE detainees, as well other information to clarify the hodgepodge of confused and secretive records regarding the mix of detention facilities used by the agency to house them, goes back to February 2006. At that time, in addition to seeking information about the detainees and their individual characteristics, TRAC requested copies of all ICE contracts with private companies as well as all the Intergovernmental Service Agreements." Although TRAC ultimately obtained copies from ICE of what it said were complete records of contracts and Intergovernmental Service Agreements and records on each detainee from DHS's Enforcement Case Tracking System, "the materials produced by ICE after more than a two-year delay were both incomplete and heavily redacted." *Id.* at 3.

U.S. Immigration and Customs Enforcement Process for Authorizing Medical Care for Immigration Detainees, OIG-10-23, December 2009, 2 ("OIG-10-23 Report"), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-23_Dec09.pdf.

This continuous turnover in facilities exacerbates the unpredictable movement of ICE detainees. During the first six months of 2008, the latest period for which data are available, the majority of detainees (52.4%) had been transferred from one detention facility to another at least once, and many more than once. TRAC Report, *supra*. These transfers occur despite the fact that the majority of ICE detainees are detained for less than 30 days. *ICE Fiscal Year 2008 Annual Report* 20, available at http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf. ICE's system of placing detainees in a variety of facilities has been described as "haphazard" with ICE claiming "an almost unfettered power to transfer detainees at will, resulting in a disorderly system of detainee musical chairs that often violates non-citizens' rights." Human Rights Watch, *Locked Up Far Away, The Transfer of Immigrants to Remote Detention Centers in the United States* (December 2, 2009) 13, available at http://www.hrw.org/en/reports/2009/12/02/locked-far-away.

II. THE DIHS, A COMPONENT OF ICE'S DETENTION AND REMOVAL OPERATIONS, HAS RESPONSIBILITY FOR ENSURING HUMANE CONDITIONS FOR IMMIGRANT DETAINEES.

The Office of Detention and Removal Operations (DRO) is "the primary enforcement arm within ICE for

the identification, apprehension and removal of illegal aliens from the United States." Office of Detention and Removal, http://www.ice.gov/pi/dro/ (last visited Jan. 19, 2010). The Division of Immigration Health Services (DIHS), "is a component of DRO." *The Director's Perspective, The Rapid Pulse: Communiqué of The Division of Immigration Health Services* (Nov. 2009), http://www.inshealth.org/RapidPulse/2009/RPsepoctnov09.pdf (last visited Jan. 19, 2010) ["*The Rapid Pulse Nov. 2009*"]. "DIHS serves as ICE's authority for medical issues. DIHS provides for the primary health care of detainees housed in DIHS-staffed detention centers, and oversees the financial authorization and payment for off-site specialty and emergency care for detainees in ICE custody." OIG-10-23 Report at 2.[3]

DIHS understands itself to share in the enforcement mission of its parent agency. *See, e.g., The Director's Perspective, The Rapid Pulse: Communiqué of The Division of Immigration Health Services* (July 2006), http://www.inshealth.org/RapidPulse/2006/RPJuly06.pdf (last visited Jan. 19, 2010) ("DIHS will have a critical role to play in President Bush's Secure Border Initiative (SBI).... One of the goals of the SBI is to end the 'catch and release' of non-Mexican illegal aliens.... One of the remedies to this problem is for DHS to expand the capacity of its detention system

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[3] There appears to be some confusion of the status of DIHS. According to the DRO website, "[p]rimary healthcare for alien detainees is managed by the Division of Immigration Health Services (DIHS). The DIHS is located within the Bureau of Primary Health Care of the Public Health Service of the Department of Health and Human Services (HHS)." Office of Detention and Removal, http://www.ice.gov/pi/dro/ (last visited Jan. 19, 2010).

by bringing more 'beds' online, along with the appropriate staff, in order to detain aliens until their removal. This is where DIHS will play a vital role."); *The Director's Perspective, The Rapid Pulse: Communiqué of The Division of Immigration Health Services* (Sept. 2007), http://www.inshealth .org/RapidPulse/RPSep07.pdf (last visited Jan. 19, 2010) ("I would first like to commend each of you for your commitment and dedication to our mission to protect America by providing health care and public health services in support of immigration law enforcement."); *The Rapid Pulse* Nov. 2009, *supra* ("it is clear where DIHS sits within DRO. Our position at this level in DRO clearly reflects the importance of our contributions as the medical authority for healthcare for the detainees in ICE custody. It also represents a challenge and increased responsibility as leaders, clinicians and healthcare subject matter experts (SMEs)."). Thus, while some individuals at DIHS are commissioned officers of PHS,[4] the DIHS itself is within the enforcement arm of the Department of Homeland Security.

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[4] The PHS Commissioned Corps officers serve in a variety of positions throughout the U.S. Department of Health and Human Services (HHS) and certain non-HHS Federal Agencies and programs such as in the Division of Immigration Health Services of the U.S. Department of Homeland Security. *See* U.S. Public Health Service Commissioned Corps, http://www.usphs .gov/aboutus/questions.aspx#whatis (last visited Jan. 19, 2010).

A. ICE Has Detention Standards For Medical Care, But They Are Not Legally Enforceable.

In 2000, the INS, ICE's predecessor, adopted a set of detention standards to provide minimum safeguards for the fair and humane treatment of detainees. *See* U.S. Immigration and Customs Enforcement, Detention Operations Manual (2000), available at http://www.ice.gov/pi/dro/opsmanual/index.htm. These standards were to apply to facilities that hold non-citizens in ICE custody for 72 hours or more. The Detention Standard for Medical Care in place during Francisco Castaneda's detention in 2006-2007 begins, "All detainees shall have access to medical services that promote detainee health and general well-being." INS Detention Standard, Medical Care, September 20, 2000, p. 1, available at: http://www.ice.gov/doclib/pi/dro/opsmanual/medical.pdf.

These detention standards, however, are merely internal agency guidelines and do not have the binding authority of federal regulations or statutory law, and therefore cannot be meaningfully enforced. *See Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009). Indeed, it appears that ICE took no steps to actually enforce the standards, not even training its employees on their contents. *Id.* at 537. "It has become clear that the lack of a legal enforcement mechanism has seriously undermined the effectiveness of the [ICE National Detention] Standards, and that in turn has contributed to the deficiency of medical care provided to detainees in some circumstances." *Problems with Immigration Detainee Medical Care*, June 4, 2008, Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law

Hearing (statement of William H. Neukom, President, ABA), at 4, http://www.abanet.org/poladv/letters/immigration/050209letter_immigration.pdf.

B. Immigrant Detainees Have No Right To Counsel, Speak Limited English, And Face Insurmountable Procedural Obstacles When They Request Medical Treatment.

Amicus NIJC routinely advocates for detainees who need medical care and who cannot obtain it in ICE detention. *See generally Problems with Immigration Detainee Medical Care*, June 4, 2008, Hearing before H. Judiciary Comm., Subcomm. on Immigration, Citzenship, Refugees, Border Security & International Law 10 (statement of Mary Meg McCarthy, Executive Director, National Immigrant Justice Center), http://judiciary.house.gov/hearings/pdf/McCarthy080604.pdf. Even though immigration detention is civil and administrative in nature, the atmosphere is one of criminal imprisonment. Detainees are not afforded the right to appointed counsel, as are criminal defendants and prisoners. Language barriers create further difficulties in obtaining relief in the case of inadequate medical care. Complaints about access to medical care are a constant theme in NIJC's conversations with detained immigrants. The grievances range from the denial of over-the-counter paid medication to a refusal to provide life-sustaining medication for chronic illnesses. Without an attorney or an advocate, these individuals would never have received appropriate medical care. In NIJC's experience, when detainees request treatment or complain about inadequate care, they "face insurmountable procedural obstacles and an

accountability vacuum within both ICE and DIHS." McCarthy Testimony at 10.

III. SERIOUS PROBLEMS WITH MEDICAL CARE SERVICES BEING PROVIDED TO IMMIGRANT DETAINEES HAVE BEEN REPORTED IN STUDIES AND BY THE MEDIA.

A. The Bellevue/New York University Report.

In the past several years there have been documented instances of problems with the medical care services being provided to immigrant detainees held in ICE facilities. For example, in June 2003, the Bellevue/New York University Program for Survivors of Torture and Physicians for Human Rights issued a report, *From Persecution to Prison: the Health Consequences of Detention for Asylum Seekers*, for which it interviewed 70 asylum seekers held in immigration detention (the "2003 Bellevue/NYU Report"). In October 2007, the Director of the Bellevue/NYU program, Dr. Allen S. Keller, then an Associate Professor of Medicine at New York University School of Medicine and a member of the Advisory Board of Physicians for Human Rights, testified at a Hearing on "Detention and Removal: Immigration Detainee Medical Care," in which he recounted the findings of the 2003 study before the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, with many of the findings sounding eerily similar to the problems noted more recently:

In this study we interviewed 70 asylum seekers held in immigration detention. We documented both high levels of psychological distress, which worsened during the course of detention, and inadequate or non-existent mental health services. We also documented difficulties accessing medical and dental services for painful and sometimes dangerous health problems. Unfortunately, recent reports in major newspapers such as the *New York Times* and the *Washington Post* demonstrate that the problems we identified with regards to accessing health care in immigration detention have not been corrected. In fact, the concerns are even greater today, because current immigration policies continue to expand the use of immigration detention. While our study focused on asylum seekers in immigration detention, the findings clearly have relevance to all immigrant detainees.[5]

* * *

In addition to inadequate mental health services, more than half of the 62 individuals (56%) who reported having serious health problems reported having at least one serious condition for which they had substantial

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[5] For the 2003 Bellevue/NYU Report, the asylum seekers interviewed were held in detention facilities in the New York City area, including in private contract facilities, such as the Elizabeth Detention Center in Elizabeth, New Jersey, and several county jails in New York, New Jersey and Pennsylvania. Individuals interviewed had already been detained for from one month to four and one-half years. Keller Statement at 1-2.

> difficulty accessing medical services. Many detainees complained of difficulty obtaining specialized care, including treatment for chronic conditions. This raises important questions about what care is appropriate and what can reasonably be delayed. A fundamental problem we saw—and one which appears to persist today—was that health care was provided with, at best, a short-term, stop-gap, "jail mentality." That is, medical care seemed based on the assumption that patients would only be detained for a few days or weeks, while in fact many of the individuals we interviewed were detained for months or years.
>
> As a result, detainees reported that medical conditions perceived as chronic or non-acute could be addressed only after their release from custody. Many also described being aware of bureaucratic difficulties related to obtaining care, including delays in getting approval for certain diagnostic procedures or treatment.

Detention and Removal: Immigration Detainee Medical Care, Oct. 4, 2007, Hearing before H. Judiciary Comm., Subcomm. On Immigration, Citizenship, Refugees, Border Security, and International Law, 2-3 (statement of Allen S. Keller, M.D., Associate Professor of Medicine), http://physiciansforhumanrights.org/library/documents/testimony/a-keller-immigration-subcommitttee.pdf.

B. The Washington Post Articles.

In 2008, The Washington Post ran a series of articles in which it identified 83 deaths of immigration

detainees between March 2003, when ICE was created, and March 2008. The report found that 30 of the deaths were questionable. *See* Dana Priest and Amy Goldstein, *Series: Careless Detention: Medical Care in Immigrant Prisons*, The Washington Post, May 11-14, 2008, available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html:

> Some 83 detainees have died in, or soon after, custody during the past five years. The deaths are the loudest alarms about a system teetering on collapse. Action taken – or not taken – by medical staff members may have contributed to 30 of those deaths, according to confidential internal reviews and the opinions of medical experts who reviewed some death files for The Post.

Id. at 3.

The case studies tell chilling stories of actions and inaction and decisions made by individuals, some of whom were employed by PHS, that reflect an indifference to pain and suffering and an unwillingness to deal quickly and effectively with extraordinary health situations. Day 1 of the series is entitled, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in their Care Often Pay a Heavy Cost*, in which the reporters described one death of an immigrant detainee from Ghana in June 2006 at the San Diego Correctional Facility ("SDCF") – the same facility in which

Francisco Castaneda was held from March 27, 2006 until November 17, 2006:[6]

> Osman's death is a single tragedy in a larger story of life, death and often shabby medical care within an unseen network of special prisons for foreign detainees across the country. Some 33,000 people are crammed into these overcrowded compounds on a given day, waiting to be deported or for a judge to let them stay here. *Id.*, Day 1 at 2.
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> * * *
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> Medical spending has not kept pace with the growth in population. Since 2001, the number of detainees over the course of each year has more than tripled to 311,000, according to ICE and the Government Accountability Office. Meanwhile, spending for the DIHS and outside care has not quite doubled, ICE figures show. ICE's conflicting population and budget numbers made the trends difficult to determine. *Id.*, Day 1 at 4.

In the article, nurses are quoted as saying, "Dogs get better care in the dog pound." *Id.* at 5. Petitioner Dr.

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[6] Day 2 of the series is entitled, *In Custody, In Pain: Beset by Medical Problems as She Fights Deportation, A U.S. Resident Struggles to Get the Treatment She Needs*; Day 3 is entitled *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*; and Day 4 completes the series with an article entitled, *Some Detainees Are Drugged For Deportation: Immigrants Sedated Without Medical Reason*.

Hui is mentioned as having "sent a memo to DIHS medical director Timothy T. Shack, saying her colleagues were worried that they might be sued because of the substandard care they were giving detainees. The agency's mission of 'keeping the detainee medically ready for deportation' often conflicts with the standards of care in the wider medical community, Hui wrote. 'I know in my gut that I am exposing myself to the US legal standard of care argument. ...Do we need to get personal liability insurance?'" *Id.*, Day 1 at 4.

Francisco Castaneda is also discussed in Day 1 of the series under Dana Priest and Amy Goldstein, *E-Mails Show Attempt to "Patch Up" a Case of Medical Negligence* at A9, available at http://www. washington post.com/wp-srv/nation/specials/immigration/ cwc_d1sidebar.html. The article reveals a CCA Inmate/Resident Grievance Form completed by Mr. Castaneda on June 12, 2006 and August 17, 2006, and an e-mail from one physician's assistant to another at SDCF, in which the first physician's assistant requests a "favor" from the other: "Could you somehow 'patch up' that Grievance with an amendment, then put it in my box. I just want to avoid problems when the Auditors show up." *Id.* under "Key Documents." *See also* Thomas Larson, *Go Directly to Jail...and Die*, San Diego Reader, Dec. 10, 2008, available at http://www.sandiegoreader.com/news/2008/dec /10/cover.

C. Recent Articles In The New York Times.

More recently, articles appearing in the New York Times reported new disturbing evidence about detainee deaths that appear to have involved

substandard medical care or abuse. *See* Nina Bernstein, *Documents Reveal Earlier Immigrant Deaths*, N.Y. Times, Jan. 9, 2010, available at http://www.nytimes.com/2010/01/10/nyregion/10detainside.html and Nina Bernstein, *Officials Hid Truth of Immigrants Deaths in Jail*, N.Y.Times, Jan. 10, 2010, available at www.nytimes.com/2010/01/10/us/10detain.html. The results of the Times investigation reveal "a culture of secrecy" that has endured and may continue to endure:

> But behind the scenes, it is now clear, the deaths had already generated thousands of pages of government documents, including scathing investigative reports that were kept under wraps, and a trail of confidential memos and BlackBerry messages that show officials working to stymie outside inquiry.

1/10/10 NY Times Article. Internal documents suggest that inside ICE there was an appreciation of the "horrible medical stories" that had arisen, but the public face put on the situation by ICE was a much rosier picture of the detainee medical care system and an improved mortality rate. *Id.*

IV. The Government's Response To Reports Of Detainee Deaths And Inadequate Medical Care.

As Justice Harlan noted in his concurrence in *Bivens*, "the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 407 (1971). The problems with medical treatment

of immigrant detainees are unlikely to be resolved by the political branches, precisely because of the unpopular nature of immigrants; particularly immigrants perceived as unlawful immigrants or criminal aliens, such as those in ICE detention.

This is not to say that the political branches have been entirely inactive in this area. Spurred by "troubling media reports about detainee deaths," Congress has held hearings on the treatment of immigrant detainees. *Health Services for Detainees in U.S. Immigration and Customs Enforcement Custody*, March 3, 2009 Hearing, Subcomm. on Homeland Security (statement of David Price, Chairman), available at http://appropriations.house.gov/pdf/HS-FY10-03-03-09.pdf (stating as purpose of hearing "to investigate the health care services ICE provides to individuals held in its custody at detention centers around the country, and to discuss efforts that DHS will make to improve those services"). Likewise, GAO reports have been requested concerning compliance with ICE's Medical Care standards. *See Alien Detention Standards, Observations on the Adherence to ICE's Medical Standards in Detention Facilities*, Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law, Comm. on the Judiciary (statement of Richard M. Stana, Director, Homeland Security and Justice Issues) June 4, 2008, 1, available at http://www.gao.gov/new.items/d08869t.pdf.

The Executive branch has also recently responded to these issues. Dora Schriro, then newly appointed Special Advisor on Detention and Removal Operations at ICE to Secretary Napolitano, stated candidly on detention deaths in custody that "[i]n several recent

instances, the medical and custodial care that those detainees received before expiring appeared to be contrary to DRO policy." *Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody*, Hearing before the H. Appropriations Comm., Subcomm. on Homeland Security, March 3, 2009 (statement of Dora Schriro, Special Advisor to Secretary Napolitano on Detention and Removal Operations) 3, available at http://appropriations.house.gov/Witness_testimony/HS/Dora_Schriro_03_03_09.pdf. She also expressed the opinion that there was reason for concern: "Clearly, many concerns have been expressed within government and by the community for some time about the medical care and treatment that the ICE detainees receive and detainee deaths in custody. In my view, there is reason for concern." In October 2009, Ms. Schriro issued a report on *Immigration Detention: Overview and Recommendations*, which presented a "seven part framework for meeting the challenge of developing a new system of Immigration Detention" including recommendations for medical care and accountability. *See* Dr. Dora Schriro, Department of Homeland Security, Immigration and Customs Enforcement, *Immigration Detention: Overview and Recommendations*, October 6, 2009, available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. According to Dr. Schriro, "Some recommendations can be actualized soon; others will require further analysis, including a comprehensive budget review. In order for ICE to achieve sustainable, organizational change, it must continue the progress of recent months." *Id.* at 3. *See also* OIG-10-23 Report, available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-23_Dec09.pdf.

But these efforts have not led thus far to significant improvements for immigrant detainees; and in the absence of continued attention to these issues, improvements are unlikely. As with other reform issues, "political realities dictate that reform may be difficult to achieve in the immediate future." American Bar Association, *Ensuring Fairness and Due Process in Immigration Proceedings* 1, available at http://www.abanet.org/poladv/transition/2008dec_immigration.pdf.

V. THE PETITIONERS IGNORE THE SHAMING FUNCTION OF *BIVENS* LIABILITY WHILE OVERSTATING ITS POTENTIAL EFFECTS ON RECRUITMENT, DESPITE THE FACT THAT PHS, ITSELF, STATES THAT IT PROVIDES MALPRACTICE INSURANCE TO ITS RECRUITS.

Petitioners and Amici make much of the potential for *Bivens* liability to affect PHS's ability to attract and maintain quality staff. They claim that opening PHS officials to potential *Bivens* liability would effectively require PHS officials to give up part of their below market rate salaries to pay for malpractice insurance. Gonsalves Br. 53; Hui Br. 43-45; U.S. Br. 14; C.O.A. Br. 6.

The Public Health Service's website suggests that this consideration is substantially overstated. The PHS website specifically states that PHS currently provides malpractice coverage to PHS officers.

> Commissioned Corps benefits are generous. They include:

- Competitive starting pay that increases with promotions and years of service

* * *

- **Malpractice insurance coverage**

U.S. Public Health Service Commissioned Corps, http://www.usphs.gov/aboutus/questions.aspx (last visited Jan. 19, 2010) (emphasis added). To the extent that liability insurance was one of the rationales for the enactment 42 U.S.C. § 233(a), it would appear that that rationale has been superseded.

By contrast, the Petitioners understate or ignore the deterrent impact of *Bivens* liability on governmental agencies. As this Court noted in *Carlson v. Green*, 446 U.S. 14 (1980), in addition to compensating victims, the *Bivens* remedy deters grave mistreatment in part by labeling unconstitutionally deficient treatment as such. 446 U.S. at 21. Executive branch officials are, "motivated not only by concern for the public fisc but also by concern for the Government's integrity," *Carlson*, 446 U.S. at 21, or at least, motivated by the perceptions of the agency's integrity. *Bivens* liability has a shaming effect, by labeling an agency's actions as violative of constitutional rights. Because *Bivens* actions play an important function of exposing and labeling mistreatment that falls below constitutional standards – mistreatment which otherwise would remain unchecked – the repeated failure of DIHS to ensure adequate medical treatment for all immigrant detainees ought to weigh heavily in this Court's decision in this matter.

CONCLUSION

For these reasons, and those stated in Respondents' brief, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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